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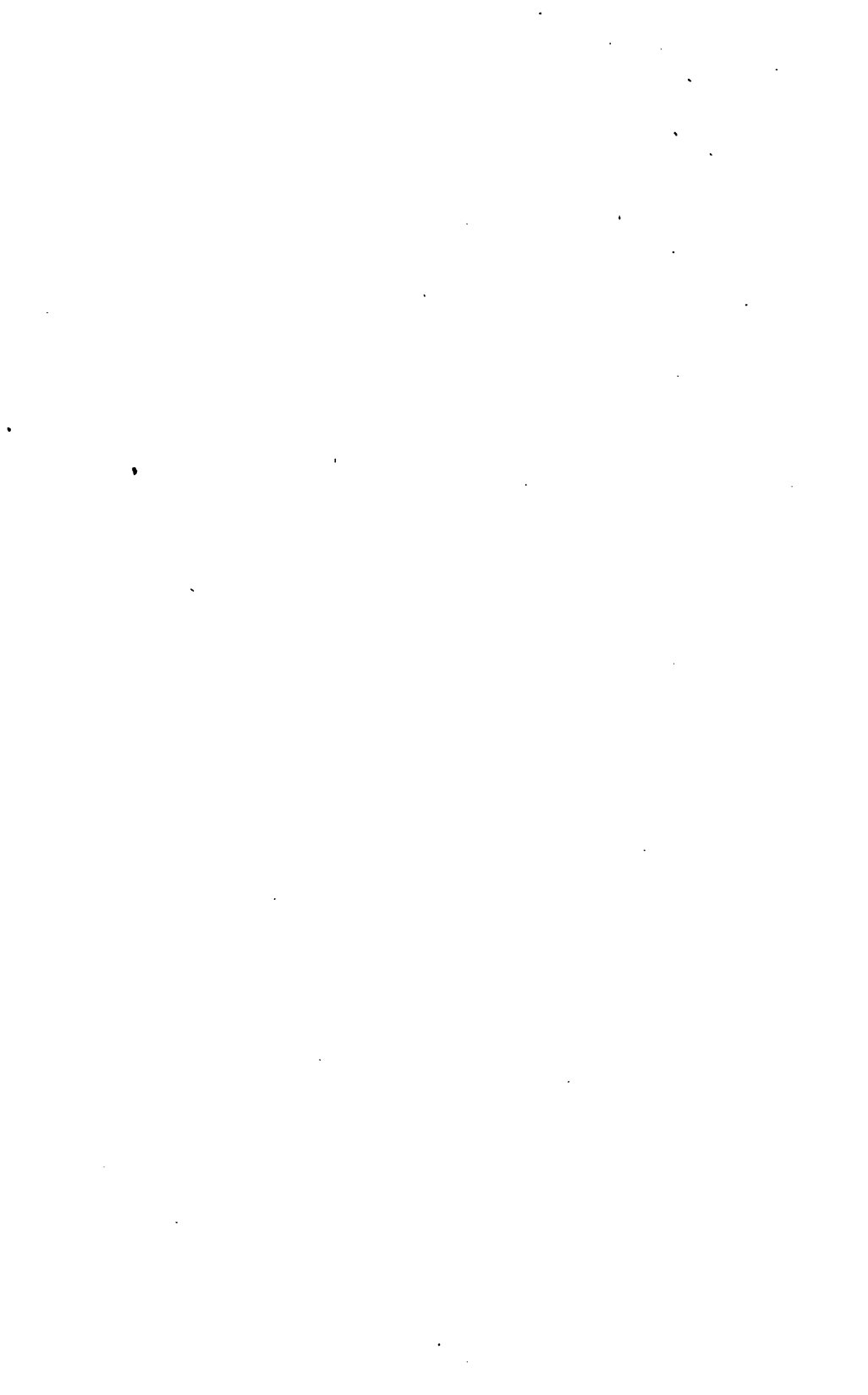
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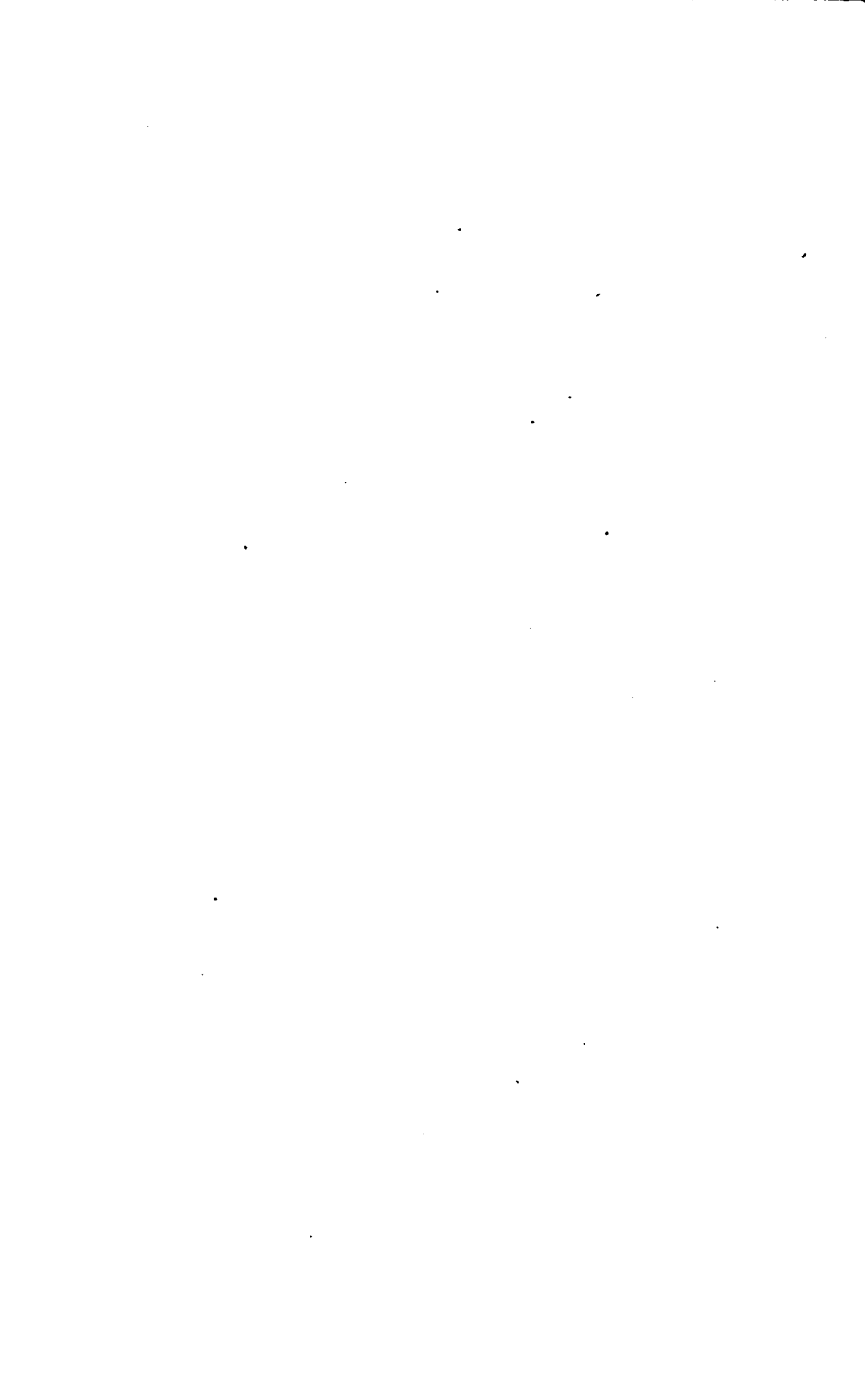
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REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO SEPTEMBER 19, 1916, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CXCVII
A. D. 1916.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, FEBRUARY 1, 1916.
FOURTH DISTRICT, DECEMBER 4, 1915.

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EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

CHICAGO
CALLAGHAN & COMPANY
1916

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JAN 15 1917

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO SEPTEMBER 19, 1916.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—GEORGE A. COOKE.....Aledo.

Fifth District—CHARLES C. CRAIG.....Galesburg.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff,

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER*, Justice, Michigan Blvd. Bldg., Chicago.

FIRST BRANCH**

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN P. MCGOORTHY, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

SECOND BRANCH***

JOHN M. O'CONNOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

CLARENCE N. GOODWIN, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DOBBANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

EDGAR ELDEREDGE, Presiding Justice, Ottawa.

EMERY C. GRAVES, Justice, Geneseo.

GEORGE W. THOMPSON, Justice, Galesburg.

* Appointed October 11, 1916.

** This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. § 2981.

*** Established under act of June 6, 1911, J. & A. § 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.

JAMES C. MCBRIDE, Justice, Taylorville.

FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

DEWITT T. HARTWELL, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: J. C. EAGLETON, Robinson.

JULIUS C. KERN, Carmi.

CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BEENREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.

JAMES C. MCBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.

WALTER BREWER, Toledo.

AUGUSTUS A. PARTLOW, Danville.

* Laws 1897, 188, J. & A. § 8070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BUSTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDBREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: WILLIAM T. CHURCH, Aledo.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.

DUANE J. CARNES, Sycamore.

MAZZINI SLUSSER, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.

CHARLES H. DONNELLY, Woodstock.

CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—Frank J. Walsh, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—August W. Miller, County Building, Chicago.

JUDGES.

RICHARD S. TUTHILL,
JESSE A. BALDWIN,
ROBERT E. CROWE,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,
JESSE HOLDOM,
VICTOR P. ARNOLD,
DAVID M. BROTHERS,
CHAS. M. THOMSON,

DAVID F. MATCHETT,
JOHN GIBBONS,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOORTY,
FREDERICK A. SMITH,
CHARLES M. WALKER,
GEO. F. BARRETT,
THOMAS TAYLOR, JR.,
OSCAR M. TORRISON.

SUPERIOR COURT.

CLERK—JOHN KJELLANDER, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
 JOHN M. O'CONNOR,
 THEODORE BRENTANO,
 JOSEPH SABATH,
 JOSEPH B. DAVID,
 WILLIAM FENIMORE COOPER,
 WILLIAM E. DEVER,
 MARTIN M. GRIDLEY,
 CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
 JOSEPH H. FITCH.
 JOHN J. SULLIVAN,
 ALBERT C. BARNES,
 HUGO PAM,
 M. L. MCKINLEY,
 CLARENCE N. GOODWIN,
 CHARLES M. FOELL,
 DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

W. C. FLANNIGAN, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge.

LORAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge.

A. C. SHIPLEY, Clerk.

THE CITY COURT OF CARBONDALE.

HERBERT A. HAYS, Judge.

DALLAS MEISENHEIMER, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. McEWEN, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

H. L. BROWNING,

W. M. VANDEVENTER, Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.

WM. H. PARISH, Jr., Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. ANNA DALE, Clerk.

THE CITY COURT OF JOHNSTON CITY.

J. H. CLAYTON, Judge. J. E. SULLINS, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEBOY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. LAURETTA SALZMAN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LITTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEO. A. SCHRAEDER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM H. HAWTHORNE, Judge. PETER ROLANDE, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF WEST FRANKFORT.

H. R. DIAL, Judge. PEARL BEATTIE, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. T. 3313 *et seq.*

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,

HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER
EDWARD T. WADE
JOHN K. PRINDIVILLE
JOSEPH P. RAFFERTY
JOHN COURTNEY
JOHN RICHARDSON
JOHN A. MAHONEY
WILLIAM N. GEMMILL
FRANK H. GRAHAM
WELLS M. COOK
HUGH J. KEARNS

JOSEPH S. LABUY
JOHN R. NEWCOMER
JOHN R. CAVERLY
JOHN A. SWANSON
HUGH R. STEWART
HARRY P. DOLAN
JOHN S. HAAS
HOWARD HAYES
ARNOLD HEAP
BERNARD P. BARASA
SAMUEL H. TRUDE
LEO DOYLE
EDMUND K. JARECKI
CHARLES N. GOODNOW
DENNIS W. SULLIVAN
SHERIDAN E. FRY
JOHN STELK
JOSEPH Z. UHLIS
HOSEA W. WELLS.

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermillion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES	COUNTIES	COUNTY SEATS
LYMAN MCCABE.....	Adams.....	Quincy.
MILES F. GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES A. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARBAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HOFNER, PRO. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RABIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. J. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNET OVERBECK.....	Effingham.....	Effingham.
JEROME G. WILLS.....	Fayette.....	Vandalia.
M. L. MCQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
ROBERT S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
ARTHUR A. MILES.....	Hardin.....	Elizabethtown.
RUFUS S. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Galesburg.
R. C. RICE.....	Knox.....	Yorkville.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

JUDGES	COUNTIES	COUNTY SEATS
ALBERT T. LARDIN, Pro. J.	La Salle	Ottawa.
OTTO W. LONGNECKER	Lawrence	Lawrenceville.
JOHN B. CRABTREE	Lee	Dixon.
B. R. THOMPSON	Livingston	Pontiac.
CHARLES J. GEHLBACH	Logan	Lincoln.
JOHN H. MCCOY	Macon	Decatur.
ANDREW J. DUGGAN	Macoupin	Carlinville.
H. B. EATON	Madison	Edwardsville.
JOSEPH P. STREUBER, Pro. J.	Madison	Edwardsville.
WILLIAM G. WILSON	Marion	Salem.
DANIEL H. GREGG	Marshall	Lacon.
JAMES A. MCCOMAS	Mason	Havana.
LANNES P. OAKES	Massac	Metropolis.
CHARLES I. IMES	McDonough	Macomb.
DAVID T. SMILEY	McHenry	Woodstock.
JAMES C. RILEY	McLean	Bloomington.
JESSE M. OTT	Menard	Petersburg.
F. L. CHURCH	Mercer	Aledo.
HENRY SCHNEIDER	Monroe	Waterloo.
J. T. McDAVID	Montgomery	Hillsboro.
WM. E. THOMSON	Morgan	Jacksonville.
JOHN T. GRIDER	Moultrie	Sullivan.
FRANK E. REED	Ogle	Oregon.
CHESTER F. BARNETT	Peoria	Peoria.
WALTER A. CLINCH, Pro. J.	Peoria	Peoria.
LOUIS R. KELLY	Perry	Pinckneyville.
WM. A. DOSS	Platt	Monticello.
PAUL F. GROTE	Pike	Pittsfield.
BENJ. F. ANDERSON	Pope	Golconda.
FRED HOOD	Pulaski	Mound City.
IRVING E. BROADBUSH	Putnam	Hennepin.
WM. M. SCHUWERK	Randolph	Chester.
ROBT. B. WITCHER	Richland	Olney.
NELS A. LARSON	Rock Island	Rock Island.
BENJ. S. BELL, Pro. J.	Rock Island	Rock Island.
CHAS. D. STILWELL	Saline	Harrisburg.
JOHN B. WEAVER	Sangamon	Springfield.
C. H. JENKINS, Pro. J.	Sangamon	Springfield.
JOHN C. WORK	Schuyler	Rushville.
F. C. FUNK	Scott	Winchester.
A. J. STEIDLEY	Shelby	Shelbyville.
FRANK THOMAS	Stark	Toulon.
JOSEPH B. MESSICK	St. Clair	Belleville.
FRANK PERRIN, Pro. J.	St. Clair	Belleville.
ROSCOE J. CARNAHAN	Stephenson	Freeport.
JAMES M. RAHN	Tazewell	Pekin.
MONROE C. CRAWFORD	Union	Jonesboro.
LAWRENCE T. ALLEN	Vermillion	Danville.
W. J. BOOKWALTER, Pro. J.	Vermillion	Danville.
W. S. WILLHITE	Wabash	Mt. Carmel.
L. E. MURPHY	Warren	Monmouth.
W. P. GREEN	Washington	Nashville.
J. V. HEIDINGER	Wayne	Fairfield.
J. M. ENDICOTT	White	Carmi.
WM. A. BLODGETT	Whiteside	Morrison.
GEORGE J. COWING	Will	Joliet.
JOHN B. FITHIAN, Pro. J.	Will	Joliet.
W. F. SLATER	Williamson	Marion.
LOUIS M. RECKHOW	Winnebago	Rockford.
ARTHUR C. FORT	Woodford	Eureka.

**CASES IN THIS VOLUME IN WHICH CERTIORARI HAS BEEN
DENIED:**

The following table shows the Appellate Court cases reported in this volume in which certiorari has been applied for and denied, thus making the opinion of the Appellate Court final. (See Practice Act, sec. 121, J. & A. ¶ 8658.)

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CASES
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1915.

**Frank Paskewie by H. C. Gerke, Guardian, Appellant,
v. East St. Louis & Suburban Railway Company,
Appellee.**

1. PLEADING, § 102*—*when plea puts darrein continuance bad.* A plea puts darrein continuance of a former adjudication of the same cause of action is bad if such plea fails to allege that the former judgment pleaded is either satisfied or is in full force and effect.

2. INFANTS, § 34*—*when person bringing suit as next friend presumed to have authority to act.* Where an action is brought in the name of an infant by his "next friend," such person is presumed to have authority so to bring the action.

3. INFANTS, § 54*—*when judgment in action by next friend not void.* A judgment in an action brought by a "next friend" in the name of an infant is not rendered void at law by the misconduct of the "next friend" and can be set aside only in equity.

4. INFANTS, § 56*—*when decree by agreement will be set aside.* A decree against an infant by agreement is erroneous but not void and may be set aside on a bill of review.

5. JURISDICTION, § 69*—*when exclusive jurisdiction may be waived.* The rule giving exclusive jurisdiction of a cause of action to the court first acquiring jurisdiction of such action may be waived by the parties.

6. JUDGMENT, § 5*—*when judgment may be taken in county other than one in which first pending.* Where the courts of two

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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counties have jurisdiction of the parties and subject-matter of a cause of action, and where an action is pending in one of the counties on such cause and between the same parties, the parties may for any reason take judgment in the other county.

7. *LIS PENDENS*, § 12*—*who may take advantage of pendency of action in another court.* Where the courts of two counties have jurisdiction of the parties and subject-matter of a cause of action, and an action thereon is pending in one county, only the defendant can take advantage of the pendency of such action in a second action on the same cause instituted in the other county.

8. *JUDGMENT*, § 360*—*when cannot be collaterally attacked.* Where the courts of two counties have jurisdiction of the parties and subject-matter of an action, and where an action thereon is pending in the courts of one county, a judgment obtained in a second action on the same cause and between the same parties commenced in the other county during the pendency of the first action cannot be collaterally attacked.

9. *JUDGMENT*, § 391*—*how fraud in procuring judgment may be taken advantage of.* Where the courts of two counties have jurisdiction of the parties and subject-matter of a cause of action, and an action thereon is pending in the courts of one county, and where a judgment is obtained in an action on the same cause and between the same parties commenced in the courts of the other county during the pendency of the first action, fraud in the procurement of such judgment can only be taken advantage of by appeal or other action directly attacking the judgment.

10. *JUDGMENT*, § 5*—*when parties bound by.* Where parties voluntarily submit themselves to the judgment of a court they are bound by such judgment, although a prior action involving the same subject-matter be pending between the same parties.

11. *JUDGMENT*, § 401*—*when judgment may be pleaded in bar.* Where the courts of two counties have jurisdiction of the parties and subject-matter of a cause of action, a judgment obtained in one county may be pleaded in bar of a prior action involving the same subject-matter and between the same parties pending in the courts of the other county.

12. *JUDGMENT*, § 401*—*when may be pleaded in bar.* Where the courts of two counties have jurisdiction of the parties and subject-matter of an action, a judgment obtained in one county on such cause in an action brought in the name of an infant by his father as "next friend" may be pleaded in bar of a prior action on the same cause and between the same parties similarly brought in the other county.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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13. JUDGMENT, § 321*—*when may be directly attacked*. A judgment may be attacked directly on the ground of fraud in its procurement.

14. COURTS, § 134*—*when court first obtaining jurisdiction may proceed with cause*. If a judgment in an action commenced while an action between the same parties and on the same cause of action is pending in another county is vacated or set aside on the ground of fraud in its procurement, the parties may proceed with the action first commenced, where both counties have jurisdiction of the parties and subject-matter of the action.

15. PLEADING, § 102*—*when demurrer to plea alleging satisfaction of judgment on same cause of action properly overruled*. In an action in the name of an infant by his father as "next friend," where both the court of the county where the action was brought and the court of another county have jurisdiction of the parties and subject-matter of the action, a demurrer to a special plea alleging that during the pendency of the action a judgment was obtained in the court of the other county on the same cause of action, which judgment had been fully satisfied, *held* rightfully overruled.

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

EARLY, HILES & SIMPSON, for appellant.

WILLIAMSON, BURROUGHS & RYDER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

A declaration was filed in this case for Frank Paskewie, a minor, by his father, as next friend, against the East St. Louis & Suburban Railway Company, on May 15, 1914, charging that on May 4, 1914, while the plaintiff was returning from school, he was knocked down and injured by a car belonging to said company, and that in causing said injury said company was guilty of negligence. Subsequently H. C. Gerke, public guardian of Madison county, was appointed guardian for said minor, the father removed as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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next friend and such guardian substituted therefor, the declaration being so amended as to show such substitution. To this declaration the defendant filed the general issue and two special pleas. The case had been continued for a term and the first of the special pleas alleged that after the last pleading therein and before the filing of said special plea to wit, on the 10th day of August, 1914, the said minor, then acting by his father and next friend and by E. W. Krietner, his attorney, impleaded defendant in the Circuit Court of St. Clair county, Illinois, at the April term thereof, for and on account of the same wrongs and injuries declared upon in the declaration in this suit, and that said court having jurisdiction of the person of the defendant, did afterwards on the 10th day of August, 1914, enter judgment in favor of said Frank Paskewie, so suing by his father and next friend, John Paskewie, against said defendant for the sum of \$444 and costs of suit, which judgment still remains in force and effect and such judgment is thereupon set forth in full in the plea. The second special plea is a formal plea of former adjudication, relying upon the same facts and alleging that said defendant thereafter paid to the attorney for the plaintiff the amount of said judgment. To the special pleas, the plaintiff filed a general and special demurrer. The special causes of demurrer alleged were that the Circuit Court of St. Clair county, Illinois, was without jurisdiction when it attempted to render judgment in said cause, for the reason that this suit was commenced to the May term, 1914, of the Madison county Circuit Court which convened on May 5, 1914; that no declaration or proceeding was filed in the Circuit Court of St. Clair county until August 10, 1914, the April term of said court in Madison county then still being in session; that the judgment in the Circuit Court of St. Clair county was entered August 10, 1914, and all of said proceedings of said Circuit Court of St. Clair county were had after the Circuit Court of Madi-

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son county had acquired jurisdiction and said cause was still pending and undetermined; that therefore the Circuit Court of St. Clair county could not acquire jurisdiction of said cause and subject-matter for any purpose whatever; that said pleas do not aver that there was a hearing on the merits of the case in which judgment was attempted to be entered; that said E. W. Krietner, to whom the payment is alleged to have been made as attorney for said minor, had no legal or rightful authority to collect and receipt for any moneys due him arising out of said cause of action or otherwise; that said H. C. Gerke, who was appointed guardian of said minor by the Probate Court of Madison county, was the only person legally authorized to collect and receipt for moneys due said minor.

Upon a hearing the court overruled said demurrer, whereupon the defendant withdrew its plea of general issue and the plaintiff having elected to stand by and abide his demurrer to the defendant's special pleas, judgment was entered in favor of the defendant and against the plaintiff in bar of the action. Judgment was also entered against the plaintiff for costs to be paid in due course of the guardianship of his estate. Seeking to reverse this judgment, the plaintiff below has brought the case to this court.

Appellant here claims that the Circuit Court of Madison county had acquired jurisdiction and that it was not deprived thereof by the action of the Circuit Court of St. Clair county in the suit brought by the same parties, for the same subject-matter, especially in view of the fact that the pleadings do not directly allege that there was a hearing in the St. Clair Circuit Court upon the merits of the case. He relies upon *Schwarzschild & Sulzberger Co. v. Shapiro*, 182 Ill. App. 40, and *Miller v. McCormick Harvesting Co.*, 84 Ill. App. 571, which appear to hold pleas of former adjudication and *puis darrein continuance* bad for failing to state whether the judgment was satisfied or in full

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force and effect. It is plainly stated, however, in the pleas in question here that the judgment remained in full force and effect and also that it was fully satisfied by payment to the attorney for the plaintiff.

Appellee claims that an infant is bound by the act of his next friend in bringing suit, so far as any collateral attack on the judgment is concerned, that if there is any fraud the infant must resort to a court of equity to correct it. In *Chudleigh v. Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491, it was held that when a suit is instituted in the name of an infant by his "next friend" the authority of the "next friend" so to do is presumed and that if such friend plays the infant false, the judgment is not thereby rendered void, but that the infant must resort to a court of equity to set the same aside. In *Hunter v. Empire State Surety Co.*, 261 Ill. 335, it is held that even a decree against an infant by agreement is erroneous but not void, and that it may be set aside upon a bill of review. In *Plume & Atwood Mfg. Co. v. Caldwell*, 136 Ill. 163, it was held by our Supreme Court that "the rule giving exclusive jurisdiction to the court first acquiring it is one that the parties may waive."

The parties to the suit in St. Clair county were identical with those to the suit pending in Madison county and the subject-matter was the same. Had there been no suit pending in Madison county, the Circuit Court of St. Clair county would, under the circumstances named, have undoubtedly had jurisdiction of both the subject-matter and the parties to the suit, and if the parties in order to expedite matters, or for other good cause, sought to take judgment in the Circuit Court of St. Clair county rather than to wait until the next term in Madison county, they had a right to do so and the defendant in this suit alone could take advantage of the former suit pending. A judgment so entered could not be attacked collaterally but if there was fraud in obtaining it, advantage thereof could only

Paskewie v. East St. Louis & Sub. Ry. Co., 197 Ill. App. 1.

be taken by appeal or other action directly attacking the judgment. Where parties voluntarily submit themselves to the judgment of a court having jurisdiction of the subject-matter, they are bound by such judgment, though the same matter was pending in a prior suit. 11 Cyc. 987, subsec. C; *Gregory v. Kenyon*, 34 Neb. 640; *Bassill v. Bassill*, 207 Mass. 365.

It appears clear to us that if the appellant in this suit had been an adult and had brought suit in St. Clair county after this one was commenced in Madison county, obtained judgment and received the same and receipted therefor, that such judgment could be pleaded in bar to this suit, and there is no substantial reason why the same rule could not apply where an infant brings both suits by his father as next friend. If, however, there is fraud in connection with the procurement of the judgment, such judgment may be attacked directly, and if such attack is successful and the judgment is set aside or declared void, of course there would be nothing to prevent the parties from proceeding with the original suit commenced in another county. In this case according to the statement in the pleading the original judgment is still in force, has never been directly attacked and has in fact been satisfied by payment. It could therefore properly be pleaded in bar to this action. The court below rightfully overruled the demurrer to the special pleas and its judgment will be affirmed.

Affirmed.

Bartels v. Rudloff, 197 Ill. App. 8.

**Charles R. Bartels, Appellant, v. J. W. Rudloff et al.,
Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of Randolph county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action in attachment by Charles R. Bartels, plaintiff, against J. W. Rudloff, August Rudloff and Ed Rudloff, defendants, in the Circuit Court of Randolph county. In his affidavit plaintiff charged that defendant was about to depart from the State with the intention of having his effects removed therefrom, and that within two years last past had fraudulently conveyed and assigned his effects so as to hinder and delay his creditors. August Rudloff and Ed Rudloff filed interpleader claiming the property attached under a chattel mortgage given to them by defendant to secure an indebtedness of about \$3,200. Trial by jury was waived. The court found for plaintiff for the amount of his debt and awarded execution thereon, but found for the interpleaders and quashed the writ of attachment, ordering the release of the property attached.

From the judgment and order on the interpleader, plaintiff appeals.

Plaintiff resided in St. Mary's, Missouri, and owned a farm on Kaskaskia Island in Randolph county, Illinois. J. W. Rudloff had been a tenant on this farm for a number of years handling stock and grain. Plaintiff had taken up a mortgage against the tenant, and through various transactions an indebtedness had accumulated against him in favor of plaintiff, amounting to \$3,588.68. In November, 1913, the parties attempted to reach a settlement as to the amount due plaintiff and, failing to do so, agreed to submit the

matter to the interpleaders and John F. Bartels, a brother of plaintiff, as arbitrators. It was further agreed that whatever amount the arbitrators found due to plaintiff should be immediately paid or secured and that possession of the premises should be surrendered. The arbitration was never concluded. On November 26, 1913, J. W. Rudloff executed a note for \$3,200 due in one year, payable to August Rudloff and Ed Rudloff, with interest at seven per cent., to secure which he gave a chattel mortgage. The note and mortgage were not satisfactory, and on December 1st he executed a new note to the interpleaders for the same amount and a new mortgage covering the same property. This mortgage was recorded December 5th, and a day or two thereafter the note was delivered to Ed Rudloff. December 13th following, plaintiff filed his affidavit for attachment. There was no proof that J. W. Rudloff was about to leave the State with the intention of removing his effects therefrom.

H. CLAY HORNER, T. B. WHITLEGE and R. E. SPRIGG,
for appellant.

A. G. GORDON and P. B. HOOD, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion
of the court.

Abstract of the Decision.

1. FRAUDULENT CONVEYANCES, § 111*—*when insolvent debtor may prefer creditors.* An insolvent debtor who does not take the benefit of the General Assignment Act (J. & A. ¶ 6234 *et seq.*) may prefer one creditor to the exclusion of others if such preference is in good faith.

2. FRAUDULENT CONVEYANCES, § 109*—*when insolvent debtor may prefer creditors.* An insolvent debtor may secure certain creditors to the exclusion of others, if he acts in good faith, although such preference may to that extent operate to hinder and delay his general creditors.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. FRAUDULENT CONVEYANCES, § 264*—*when evidence sufficient to show bona fide indebtedness.* In an action in attachment where the property attached was claimed in interpleader by the holders of a chattel mortgage of such property given by defendant, evidence held sufficient to prove that at the time such mortgage was given defendant was in good faith indebted to interpleaders in the amount of the note secured by the mortgage.

4. ARBITRATION AND AWARD, § 20*—*what are duties and liabilities of arbitrators.* Arbitrators, like jurors, are held to the highest degree of good faith, and can have no secret interest in the subject-matter of the arbitration.

5. ARBITRATION AND AWARD, § 17a*—*when arbitrator not disqualified.* The fact that one of the parties to an arbitration is indebted to an arbitrator may unfit such arbitrator to act as such in the matter to be arbitrated.

6. ARBITRATION AND AWARD, § 75*—*when award may be attacked.* An award made by arbitrators may be attacked on the ground of the disqualification of arbitrators to act by reason of the fact that one of the parties to such arbitration was indebted to such arbitrators.

7. ARBITRATION AND AWARD, § 17a*—*when rules as to qualification of arbitrators apply.* Rules as to the qualification of arbitrators apply only to their action as such making an award on the matters submitted.

8. ARBITRATION AND AWARD, § 20*—*when arbitrator has right to obtain security for debt.* Where a contemplated arbitration is never concluded, the persons selected to act as arbitrators therein occupy the same position towards the parties as though such arbitrators had never been selected to act as such, and if such arbitrators are creditors of one of the parties to the proposed arbitration, such arbitrators have the same right as other creditors to obtain security for their debts.

9. FRAUDULENT CONVEYANCES, § 17*—*when mortgage does not constitute fraudulent conveyance to hinder and delay creditors.* In an action in attachment, where the goods attached were claimed in interpleader by the mortgagees in a chattel mortgage of such goods given by defendant, held that the giving of such mortgage was not a fraudulent conveyance of effects to hinder and delay creditors within the meaning of clause 7 of section 1 of the Attachment Act (J. & A. ¶ 492), although it appeared that at the time such mortgage was given defendant was insolvent, it also appearing that at such time defendant was in good faith indebted to interpleaders in the amount of the note secured by the mortgage, and that such mortgage was given in good faith.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Renner v. St. Louis, Iron Mt. & S. Ry. Co., 197 Ill. App. 11.

J. J. Renner, Appellee, v. St. Louis, Iron Mountain & Southern Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Randolph county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by J. J. Renner, plaintiff, against the St. Louis, Iron Mountain & Southern Railway Company, defendant, in the Circuit Court of Randolph county, to recover for injuries to crops growing on a farm rented by plaintiff, for the years 1910, 1912 and 1913. From a judgment for plaintiff for \$1,162, defendant appeals.

A judgment obtained by plaintiff's landlord in an action previously brought against the same defendant was reversed by this court in *Ufflemann v. St. Louis, I. M. & S. Ry. Co.*, 194 Ill. App. 42, on the ground that the suit being for rental values only no recovery could be had by the landlord for injuries to crops since the title to the crop was in the tenant until delivered or paid to the landlord.

Plaintiff rented the land from year to year, commencing in 1909, and paying as rent one-third the crops, except the hay of which he paid one-half. The farm consisted of about 259 acres and was intersected by defendant's railroad, leaving 200 acres thereof northeast of the right of way. The natural slope of this 200-acre tract is towards the railroad and through it Modoc Creek flows in a southwesterly direction passing under defendant's track and into a slough some 500 feet on the other side. This slough nearly parallels defendant's right of way and carries the water about two miles further on where it empties into the

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Mississippi River. Modoc Creek formerly spread over all this land but before the railroad was constructed the channel was cleaned out and straightened. Since the construction of the railroad, overflow channels have also been dug and all the water gathered by the channel flows under the railroad track and into the slough through three openings provided therefor by defendant, the main one being thirty-nine feet long, thirteen feet wide and some three feet deep. The embankment across the land in question, upon which the rails are laid, is about three and a half feet in height. Plaintiff claims that by reason of the maintenance of defendant's embankment, the improper construction of the outlets under it and the fact that materials were permitted to fill up the outlet, the water in times of heavy rains was held back and destroyed his crops.

Defendant claimed that before the embankment was built the land in question was low, wet, marshy and unfit for cultivation, and that no crop could have been raised on it except in excessively dry years; that by the washing down of silt and soil from the bluffs, which filled in east of the railroad, the land was improved instead of injured; that part of the overflow and damage was caused by a failure on the part of appellee to keep open the ditches on the land; that plaintiff is not entitled to recover because at the time he rented the land and from year to year thereafter, upon the renewal of his lease, he was fully advised of the existence of the embankment and the conditions relating to it. A number of witnesses were produced by the parties whose testimony was conflicting and at great variance.

The court gave the following instructions on behalf of plaintiff:

"The Court instructs the jury that if you believe from the greater weight of the evidence that the plaintiff was injured by the overflow waters of the said Modoc Creek, as alleged in the declaration, by the failure of the defendant to construct the necessary

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culverts or sluices, as the natural lay of the said land requires for the necessary drainage thereof, as alleged in the declaration, then the fact, if it is a fact, that the plaintiff knew before he leased said land, that said Modoc Creek frequently overflowed its banks, and knew of the conditions of the said railroad embankment and bridge, such knowledge on the part of the plaintiff would not be a bar to his recovery in this suit, and such knowledge of itself would constitute no legal defense for the defendant.

“The Court instructs the jury that the law of Illinois provides that in no case shall any railroad company construct or maintain its roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof.

“The Court instructs the jury that the duty of a railroad company to so construct its road across a stream or natural watercourse as not to injure adjacent land by throwing water back upon the same is a continuing one and every continuance of such nuisance is, under the law, a fresh nuisance and injury. Each overflow upon the land of the adjoining owner, caused by the improper construction of a railroad company, in its mode of constructing or maintaining an embankment or bridge over a natural watercourse, creates a new cause of action against the company that built, or the company that may be operating and maintaining such embankment or bridge at the time of such overflow, for injuries thereby caused, to the owner or the lessee lawfully in possession of such land.

“The Court instructs the jury that although a railroad company may construct a crossing over a natural watercourse in a skilful manner and according to approved principles of engineering, yet if injury necessarily results to the adjoining landowner or to any person lawfully in possession under the owner, the company will be liable.”

H. L. BROWNING and L. O. WHITNEL, for appellant;
SPRIGG & GILSTER and EDWARD J. WHITE, of counsel.

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A. E. CRISLER and A. C. BOLLINGER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 350*—*when evidence sufficient to sustain finding that culverts inadequate to carry off water.* In an action against a railroad company to recover for injury to crops by being overflowed by water, where the land in question sloped towards defendant's railroad embankment and was drained by a river which flowed under such railroad through openings in the embankment constructed and maintained by defendant, evidence held sufficient to warrant a finding that the openings through defendant's embankment were insufficient to carry off the water from plaintiff's land within a reasonable time, by reason of which such water was held back on plaintiff's land, injuring the crops growing thereon.

2. RAILROADS, § 353*—*when damages awarded tenant for injury to crops by overflow not excessive.* In an action by a tenant against a railroad to recover for injury to his crops by overflow, where the lease provides that the rent reserved thereby shall be one-third of the crops raised thereon, a verdict is not excessive where plaintiff confines his proof to two-thirds of the total loss sustained, and where the verdict was for \$1,162, while the total loss proved was \$1,970.

3. RAILROADS, § 345*—*when tenant may maintain action to recover damages for injury to land by overflow.* In case of injury to land by overflow due to inadequacy of railroad culverts to carry off water, the holder of a leasehold interest therein has a right of action to recover the proportion of the damages caused by such injury which such tenant has personally sustained, unless the land was leased after the wrongful act was done which caused the injury.

4. WATERS AND WATERCOURSES, § 24*—*when tenant from year to year may not maintain action for damages to crops due to overflow.* The general rule is that a tenant from year to year who renews his lease with knowledge of wrongful acts by an adjoining owner which have already caused injury to the crops of such tenant, due to overflow, cannot recover from such adjoining owner for injury to crops caused by such wrongful acts during the year for which such lease has been renewed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. RAILROADS, § 345*—*when liable to tenant for damages due to failure to construct proper culverts.* The general rule applicable to tenants who lease property with a knowledge of injury already done to the leased property does not apply where the injury is caused by the construction of a railroad which is controlled by clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), providing that "In no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the drainage thereof."

6. RAILROADS, § 332*—*when railroad liable for nuisance without notice to remove.* The rule that one who comes into possession either as grantee or lessee of land on which a nuisance exists cannot be held liable for damages caused thereby prior to notice, and a request to remove the nuisance has been changed by clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), in so far as applicable to railroads constructed after the passage of the statute.

7. RAILROADS, § 328*—*when must construct necessary culverts and sluices.* Under clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), the construction of all culverts and sluices necessary for the drainage of water naturally draining through the land covered by the right of way is a condition precedent to the construction of a railroad after the passage of the act, the statute in positive and express terms prohibiting the construction of the railroad until such requirement is complied with.

8. RAILROADS—*when burden on to show grounds for failure to construct required culverts and sluices.* In an action against a railroad to recover for injuries to land caused by the failure of defendant to construct culverts and sluices through its embankment as required by clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), the burden is on defendant, where the embankment in question was constructed since the passage of the statute, affirmatively to show facts in excuse of its failure to comply with the statute.

9. RAILROADS, § 342*—*when successive actions maintainable for injury due to improper construction of.* Under clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), the duty of a railroad company to construct and maintain its road across a stream in such manner as not to injure the adjacent land by throwing water back upon it is a continuing one, and each overflow resulting from a neglect to perform the duty required by the statute creates a new cause of action for the injury to land and crops caused thereby.

10. RAILROADS, § 315*—*when tenant may assume that obstruction of drainage will not be continued.* A tenant who leases prem-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ises with knowledge of the defective construction of railroad embankments on such premises which tend to obstruct drainage from his land, may act upon the presumption that the nuisance occasioned thereby would not be continued and that the railroad company would perform the continuing duty imposed by clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), to construct such culverts and sluices through its embankments as are necessary to drain adjacent land.

11. RAILROADS, § 345*—*when tenant from year to year may maintain action for injury to crops due to overflow.* In an action by a tenant to recover for injury to his crops by reason of the overflow of water on his land due to the imperfect construction of openings through a railroad embankment through which the water drained from plaintiff's land, *held* that plaintiff's action was not barred although it appeared that plaintiff was a tenant from year to year and had renewed his lease with a knowledge of the imperfections in the embankment and that such imperfections might injure such crops by causing an overflow of water thereon.

12. RAILROADS, § 352*—*when instruction in language of statute relative to construction of culverts and sluices proper.* In an action against a railroad corporation to recover for injury to crops as a result of the failure of defendant to comply with clause 5 of section 19 of the Railroad Act (J. & A. ¶ 8754), providing that "in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the drainage thereof," an instruction which stated the requirements of the statute *held* proper.

13. INSTRUCTIONS, § 151*—*when may be refused.* Requested instructions may be refused where such instructions are covered by other given instructions.

14. RAILROADS, § 350*—*when evidence sufficient to sustain verdict.* In an action by a tenant against a railroad to recover for injury to crops due to overflow, evidence *held* sufficient to entitle plaintiff to recover.

15. RAILROADS, § 352*—*when instruction as to liability of railroad although tenant knew of condition of culverts proper.* In an action by a tenant against a railroad company for damages for injury to crops sustained as a result of overflow caused by insufficient culverts, an instruction as to the liability of defendant, although plaintiff knew before he leased the land that the creek frequently overflowed its banks and of the condition of the railroad embankment, approved.

16. RAILROADS, § 352*—*when instruction as to duty of proper construction of road over watercourses being continuing one, and*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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each overflow creating cause of action proper. In an action by a tenant against a railroad company for damages for injury to crops sustained as a result of overflow caused by insufficient culverts, an instruction that the duty of the railroad to so construct its road across a natural watercourse as not to injure adjacent property owners by overflow was a continuing one, and that each successive overflow due to such cause created a new cause of action, approved.

17. RAILROADS, § 352*—*when instruction as to liability to owner or tenant for injury due to overflow proper.* In an action by a tenant against a railroad company for damages for injury to crops sustained as a result of overflow caused by insufficient culverts, an instruction that defendant was liable for injury necessarily sustained by owner or tenant even though construction of road over natural watercourse skilfully done, approved.

Sylvester Kemp, Defendant in Error, v. Southern Coal & Mining Company, Plaintiff in Error.

1. MINES AND MINERALS, § 141*—*when declaration sufficiently alleges violation of duty to inspect roof of mine.* In an action by a miner to recover for injuries sustained by reason of being struck by a clod which fell from the roof of a mine, a declaration alleging that at the time when plaintiff was injured a dangerous condition existed in the roof above the place where plaintiff was required "to work and to be," held sufficiently to allege a violation of section 24 of the Miners' Act (J. & A. ¶ 7495), requiring the mine examiner to inspect places in the mine where men "are required in the performance of their duties to pass and to work," and to mark all dangerous roofs in such places.

2. MINES AND MINERALS, § 179*—*when evidence sufficient to sustain finding that miner was in working place at time of injury.* In an action by a miner to recover for injuries sustained by being struck by a large clod which fell from the roof of the room where plaintiff was when injured, where the declaration alleged a violation of section 24 of the Miners' Act (J. & A. ¶ 7495), requiring the mine examiner to inspect all places where men were required in the performance of their duty "to pass and to work," and to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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mark all dangerous places, evidence *held* to show that plaintiff was in his working place at the time of the accident within the meaning of the act.

3. MINES AND MINERALS, § 173*—*when evidence sufficient to comply with statute.* In an action by a miner to recover for injuries sustained by being struck by a large clod which fell from the roof of the room where plaintiff was when injured, where the declaration alleged a violation of section 24 of the Miners' Act (J. & A. ¶ 7495), requiring the mine examiner to inspect all places where men were required in the performance of their duties "to pass and to work," and to mark all dangerous places, evidence *held* sufficient to comply with the statute.

4. MINES AND MINERALS, § 41*—*what is object of Miners' Act.* The object of the Miners' Act (J. & A. ¶ 7475 *et seq.*) and of other similar acts is to provide for the safety of those engaged in mining, and the requirement of too literal a compliance therewith will deprive such acts of the power to accomplish their object.

5. MINES AND MINERALS, § 132*—*when miner failing to sound roof of mine guilty of contributory negligence.* In an action by a miner to recover for injuries sustained as a result of being struck by a large clod which fell from the roof of the room where plaintiff was when injured, where there is a violation of section 24 of the Miners' Act (J. & A. ¶ 7495) by defendant, a violation by plaintiff of paragraph C of section 23 of the same Act (J. & A. ¶ 7497), requiring miners to sound and examine the roof of their working places before commencing work, amounts merely to contributory negligence.

6. MINES AND MINERALS, § 125*—*when contributory negligence no defense.* Contributory negligence is no defense to an action brought under the Mining Act (J. & A. ¶ 7475 *et seq.*).

7. MINES AND MINERALS, § 176*—*when evidence sufficient to show dangerous condition of roof of mine.* In an action by a miner to recover for injuries sustained by being struck by a large clod which fell from the roof of the room where plaintiff was when injured, evidence *held* to show that at the time of such injury such roof was in a dangerous condition.

8. MINES AND MINERALS, § 84*—*when owner or operator liable for wilful violation of statutory duty to inspect mine.* Under the Miners' Act (J. & A. ¶ 7475 *et seq.*), the owner or operator of a mine cannot excuse himself from liability growing out of a wilful violation of such statute in failing to examine the mine properly and to mark dangerous places therein, which are known to him by showing that his examiner or manager thought the place was not dangerous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9. MINES AND MINERALS, § 84*—*what constitutes wilful violation of Mining Act.* The phrase "wilful violation" used in section 29 of the Miners' Act (J. & A. ¶ 7503) means a conscious violation.

Error to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

KRAMER, KRAMER & CAMPBELL, for plaintiff in error.

F. J. TECKLENBERG and D. J. SULLIVAN, for defendant in error.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Sylvester Kemp, defendant in error, was severely injured while working in a coal mine of plaintiff in error, on September 20, 1911, and brought suit against the company to recover damages for the injury sustained. Two trials were had by a jury resulting in favor of Kemp, and a third trial was then had before the court without a jury on a transcript of the evidence heard on the former trial. Upon this trial the court found the issues for Kemp and entered judgment against the company for \$7,000, and the latter has brought the case here by writ of error seeking to reverse the judgment on the ground that the evidence is not sufficient to support the finding and judgment in favor of Kemp, that he was not entitled to recover even if the injury to him happened in his working place in the mine, because he did not perform the duties enjoined upon him by the statute in making an examination of the roof of the working place and because, as alleged, the court erred in its holdings on propositions of law and fact submitted by plaintiff in error.

There was little controversy on the facts in the case, as shown by the proofs. The company owned and operated a coal mine in St. Clair county, Illinois. One of the rooms in this mine was known as room No. 20,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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off the northwest entry, and it was in this room that Kemp and his buddy began working. At the time of the injury this room was seventy feet long, thirty feet wide and some six feet high, and had in it a main track for cars running to within about ten feet of the face with points or spurs therefrom close up to the face. In mining the coal it was undercut with a machine and then shot down, loaded into cars and taken out. No shot firers were employed, the miners themselves both drilling the holes and firing the shots. Kemp and his buddy went to work there September 14th and worked together until the 17th, which was Sunday. On Monday and Tuesday Kemp worked alone, and on the morning of Wednesday the 20th he again went to the room alone to continue his work. He entered the mine about 8 o'clock, taking with him his dinner bucket and an oil bucket which he placed some eighteen feet from the face, three or four feet from the left side of the room and eight or ten feet from the track. He went to work shoveling up the coal which he had shot down the day before. He cleaned up next to the track and after he had loaded two cars and had shoveled the remaining coal on the left side back towards the face he was compelled to stop until he could get an empty car to load the coal into. While waiting for a car he went back to his bucket and filled his lamp. He then took a drink from his dinner bucket and was in the act of getting something to eat when a large clod, three feet long, two and a half feet wide, some three and a half inches thick and weighing about one hundred pounds fell from the roof upon him inflicting severe and permanent injuries.

No complaint is made that the amount of the judgment in this case is excessive, so it is unnecessary to refer to the nature and extent of the injuries received by Kemp. The company's mine examiner, who examined the room on the morning the accident occurred and made a record thereof, stated there were no unsafe

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roofs or unsafe conditions, and it was shown by the proofs that the place in the roof where the clod was located was not marked as dangerous. At the time of the injury, the Miners' Act of 1911 was in force, and the provisions of that act in regard to inspecting and marking dangerous places were set out in paragraphs 4 and 6 of section 21 (J. & A. ¶ 7495) as follows:

"It shall be the duty of the mine examiner * * * to inspect all places where men are required in the performance of their duties, to pass or to work, and to observe whether there are any recent falls or dangerous roof or accumulations of gas or dangerous obstructions in rooms or roadways. * * * When working places are discovered in which there are recent falls or dangerous roof or dangerous obstruction, to place a conspicuous mark or sign thereat, as notice to all men to keep out; and in case of accumulation of gas, to place at least two conspicuous obstructions across the roadway, not less than twenty feet apart, one of which shall be outside the last open cross-cut." Counsel for appellant insist that the declaration was insufficient to support a finding and judgment in favor of Kemp and that proof of its allegations does not entitle him to a recovery. Each count of the declaration alleged that there was a dangerous condition in the roof above the place where plaintiff was required to work and to be and that this condition would have been discovered by the mine examiner had he made a reasonable examination of the room, but that he failed to make such an examination of the room and while plaintiff was at his working place waiting for the box which he had loaded to be removed, he was injured by the clod falling upon him. While the charge in the declaration was that there was "dangerous condition in the roof above the place where plaintiff was required to work and to be" and that the same would have been discovered, had the mine examiner "made a reasonable examination of the room," the Act of

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1911 relied on only makes it the duty of the examiner "to inspect all places where men are required in the performance of their duties, to pass or to work, and to observe whether there are any recent falls or dangerous roof or accumulations of gas or dangerous obstructions in rooms or roadways."

The criticism of counsel for plaintiff in error is that there was no duty under the statute which required the company to mark the place where plaintiff was required "to work and to be," but that its duty was only to inspect and mark places where men were required in the performance of their duty "to pass and to work," and further that it must be such place as one is required to pass and work in the performance of his duty. This distinction does not appear to us to be sound, and while the declaration does not use the exact words of the statute, yet we think the words used were sufficient to warrant a recovery in a proper case, under the statute. Counsel also criticises several counts of the declaration as being insufficient to support a finding and judgment in favor of defendant in error for the reason that they allege that had the mine examiner made a reasonable examination of the room he would have discovered the dangerous condition, it being claimed that under the Act of 1911 it was not the duty of the examiner to make an examination of the whole of the room but only of the place where the men "are required in the performance of their duties to pass or to work." This criticism of counsel also appears to us to be without sound foundation, especially in view of the fact that the statute directly requires that when working places are discovered in which there are dangerous roofs, the same shall be marked by the examiner. That Kemp was in his working place at the time he was injured, seems to us to be borne out by the proof. It is true he was not engaged in the work of drilling, firing or loading coal at the exact time when he was injured, but at that time he was engaged in

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filling his lamp and in taking water and food, all of which were necessary in the prosecution of his work at a place in the room as close to his work as the buckets containing the oil, water and food could be placed without actually interfering with his work. In fact it appears from the proof that some of the coal which had been blown down the day before was scattered around the place where the buckets sat and that part of his work was to clear this up. It appears to us that upon these questions, both the declaration and the proof were within the Statute of 1911, and to require a more literal compliance with the statute would be to deprive it of its power of providing for the safety of those engaged in mining, which must be the object of all mining acts. *Henrietta Coal Co. v. Martin*, 221 Ill. 460.

It is also claimed by counsel for the company that Kemp ought not be entitled to recover because he did not perform certain duties required of him by the Act of 1911. Paragraph C, section 23 of that Act (J. & A. ¶ 7497) provides: "Every miner shall sound and thoroughly examine the roof of his working place before commencing work, and if he finds loose rock or other dangerous conditions, he shall not work in such dangerous place except to make such dangerous conditions safe. It shall be the duty of the miner to properly prop and secure his place for his own safety with materials provided therefor." Counsel insist that it was Kemp's duty under the statute to have sounded and examined the roof before he commenced work and that if he did not do so, and there is no evidence that he did, he should not be permitted to recover. Paragraph A, section 29 of the Act of 1911 (J. & A. ¶ 7503) provides a penalty for any wilful neglect, refusal or failure to do the things required to be done by the several sections thereof, and the question might arise in a proper case as to whether Kemp had made himself subject to pay that penalty, but his omission to per-

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form his statutory duty to examine the roof, if he did omit it, could in a case of this kind amount at most only to contributory negligence on his part which is no defense to a suit brought under the mining law. *Illinois Collieries Co. v. Davis*, 137 Ill. App. 15, aff'd 232 Ill. 284; *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294, aff'd 207 Ill. 395.

It is again insisted that there was no wilful failure on the part of the mine examiner to inspect the places where plaintiff was required in the performance of his duties to pass or to work, and no wilful failure on the part of the examiner to make a proper record of examination. This is based on the fact that the proof showed the examiner did, in fact, make an examination of the mine and made a record of its condition as he claimed to have found it. That record showed that a number of rooms examined by him, including No. 20, were in good condition and that in the same there were no unsafe roofs or other unsafe conditions. The fact is, however, that the proofs show the roof in this room to have been in an unsafe condition. In *Actitus v. Spring Valley Coal Co.*, 246 Ill. 32, it is said: "We do not think the owner or operator of a mine can excuse himself from liability growing out of a wilful violation of the Mines and Mining Act,—that is, from a conscious violation of the act,—in failing to properly examine the mine and mark dangerous places therein which are known to him, on the ground that his examiner or manager in good faith thought the place was not dangerous."

The objections made by plaintiff in error to the rulings of the court upon the propositions of fact and law submitted by it do not appear to us to be well founded and relate, so far as they seem to be important, to questions which have been heretofore considered in this opinion and need not be again referred to. The finding and judgment in this case appears to us to be warranted by the evidence and the law. There have

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been three trials, twice before a jury and once before a court without a jury, all resulting in a finding in favor of defendant in error, and no substantial reason appearing to us why the judgment should be reversed, the same is affirmed.

Judgment affirmed.

**Nancy Davis, Appellee, v. East St. Louis Lodge No. 4
Loyal Order of Moose, Appellant.**

1. INSURANCE, § 898*—*when evidence sufficient to show that member of lodge "financially dependent."* In an action to recover funeral expenses under a certificate of beneficial insurance by a lodge of an order, whose by-laws provided for such recovery, where deceased was "financially dependent" on such lodge for such funeral expenses, an instruction was given at the request of defendant that "the term 'financially dependent' as used in the by-laws * * * means that the deceased member has no other source of revenue or funds from which his funeral expenses may be derived but that of the funds of the Lodge," and where on such instruction the jury found for plaintiff, evidence held sufficient to show that deceased was "financially dependent" within the meaning of the by-laws as defined by such instruction, although plaintiff in fact paid such funeral expenses in part from money received from other insurance.

2. WITNESSES, § 180*—*when question improper as assuming facts.* A question asked of a witness on cross-examination, "what was the name of the car repairers' association to which he belonged to, if you know," held improper in form as assuming that the person referred to was a member of a car repairers' association.

3. INSURANCE, § 884*—*when evidence that lodge member belonged to another association incompetent.* In an action to recover for funeral expenses under a certificate of beneficial insurance issued by a lodge of an order, whose by-laws provided for the payment of a sum not in excess of a sum named, where deceased was "financially dependent" on such lodge for such funeral expenses,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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evidence that deceased was a member of another association *held* incompetent, where it was uncontradicted that deceased's estate had no money or property, and received no insurance payable to such estate with which to pay such funeral expenses.

4. INSURANCE, § 908*—*when instruction states lodge jurisdiction correctly.* In an action against a lodge of a beneficial order to recover funeral expenses under a certificate of beneficial insurance, issued by another lodge of the same order, where the by-laws of the order provided that where a member of a lodge died within the jurisdiction of another lodge, such last-named lodge shall pay the amount due under the certificate, which should be repaid by the home lodge, an instruction that if the lodge of which deceased was a member was liable for the amount sued for, and if deceased died within the jurisdiction of defendant lodge, then the defendant was liable, *held* to state the question of lodge jurisdiction correctly.

5. INSURANCE, § 908*—*when instruction on lodge jurisdiction need not state general conditions under which plaintiff entitled to recover.* In an action against a lodge of a beneficial order to recover funeral expenses under a certificate issued by another lodge of the same order, whereby the by-laws of the order provided that where a member of a lodge died within the jurisdiction of another lodge, such last-named lodge should pay the amount due under the certificate which should be repaid by deceased's home lodge, *held* that an instruction directed to the question of lodge jurisdiction under the by-laws need not state the general conditions under which plaintiff was entitled to recover where a subsequent instruction correctly instructed the jury on the other conditions of such recovery.

6. INSURANCE, § 908*—*when instruction not obnoxious as assuming financial dependency of member on lodge.* In an action to recover for funeral expenses under a certificate of benefit insurance, where plaintiff's right to recover depended on whether at the time of his death deceased was "financially dependent" for such funeral expenses on the lodge issuing the certificate within the meaning of the by-laws of the order, and where an instruction was given defining the meaning of the quoted phrase as applied to the evidence, an instruction given for plaintiff examined and *held* not obnoxious as assuming that deceased was so dependent, and that such question was by such instruction plainly left to the jury.

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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LOUIS BEASLEY and W. H. WEBER, for appellant;
ARTHUR H. JONES, of counsel.

M. MILLARD and WILLIAM P. LAUNTZ, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Thomas P. Davis, deceased, the husband of appellee, had lived in East St. Louis for a number of years, but while working in Roodhouse, Illinois, had joined the Roodhouse Lodge of the Loyal Order of Moose. On November 15th he was injured in East St. Louis, and died the following morning in that city. The by-laws provided that each beneficiary should pay his dues quarterly in advance on the first days of January, April, July and October of each year, the same to be credited on the day actually received by the secretary, and in case a member should be in arrears fifteen days after the expiration of the quarter for which his dues were paid, he should not be "beneficial" until after a period of thirty days immediately after the payment of all arrearages. They further provide that at the next regular meeting, after the death of a benefit member, who is not in arrears for dues and is otherwise in good standing, his lodge shall prepare and draw a warrant for such sum as the by-laws provide and apply the same to the payment of the funeral expenses, which in no case shall be more than \$100; that when such member of a subordinate lodge dies beyond its jurisdiction, all necessary expenses of sickness or burial, to the amount allowed by the by-laws of the home lodge of such member, shall be paid by the lodge within whose jurisdiction said sickness or death shall have occurred, which amounts shall be repaid by the home lodge; that in the event that deceased is financially dependent upon the lodge for his funeral expenses, the thirty days' penalty imposed shall not apply. Davis did not pay his dues, accruing on October

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1, 1913, until November 7, 1913, which placed him in arrears more than fifteen days after the expiration of the quarter for which his dues should have been paid, and it is conceded that the right of recovery in this case hinges on whether he was financially dependent on the lodge for his funeral expenses or not. The jury which tried the case found that he was financially dependent and returned a verdict in favor of plaintiff for \$100. A motion for a new trial was denied and judgment entered for that amount.

Appellant complains that the evidence does not sustain the verdict; that it was denied the right of proper cross-examination and that the jury were improperly instructed on the part of appellee. The only evidence as to the financial condition of Davis at the time of his death was the testimony of appellee, who stated that he was a laborer who worked for a living; that he lived off of the wages which he earned; that he had no property or money at the time of his death; that he was insured in the Prudential Insurance Company and belonged to the Red Men; that no money was received from any insurance except the Prudential, which was payable to her; that the funeral expenses were paid by her out of the money received from the Prudential Insurance Company, so far as it went, but that she had to borrow \$57.50 to complete the payment; that the funeral expenses, amounting to \$189, were fully paid by her and none of it came from property or money belonging to deceased. At the request of appellant the jury were instructed: "The term 'financially dependent' as used in the by-laws of the Loyal Order of Moose, means that the deceased member has no other source of revenue or funds from which his funeral expenses may be derived but that of the funds of the Lodge." Assuming that this definition is correct, it clearly appeared from the proofs that deceased was financially dependent within the meaning of the by-laws. That appellee received a portion of the money

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with which the funeral expenses were paid from the Prudential Insurance Company does not in any way affect this question, as the money so derived belonged to her individually and not to the estate of the deceased.

On the cross-examination of appellee counsel for appellant asked her in reference to her husband: "What was the name of the car repairers' association he belonged to, if you know?" Objection was made to this question by counsel for appellee and sustained by the court. To this ruling appellant excepted and claims here that the same was error. The question was improper in form as it assumed that deceased was a member of a car repairers' association and for that reason should not have been permitted to be answered; but even if the question had been properly framed, it would not have been competent as the evidence was uncontradicted that there was no money or property of deceased or insurance received belonging to him to pay his funeral expenses, and the same were not paid out of his money or means. Criticism is made of the first instruction given for appellee, for the reason that it is argumentative and ignores the question whether deceased was financially dependent upon the lodge for his funeral benefit at the time of his death. This instruction, however, was not directed to that question, but only to the question of lodge jurisdiction and told the jury that if the lodge at Roodhouse was liable for the funeral benefits sued for and appellee's husband died within the jurisdiction of the defendant lodge, then the defendant lodge was liable for such benefit. This correctly stated the question of jurisdiction under the by-laws of the organization, and it was not necessary to elaborate as to the conditions covering the general right of appellee to recover. The next instruction, however, given for appellee did state, as a requirement to the right of recovery, that the jury must find that deceased was a beneficiary member of the order and

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dependent upon his lodge for his funeral expenses. Objection is made to the second instruction given for appellee, upon the ground that it assumed that the deceased member was dependent upon the lodge for his funeral benefit. A reading of the instruction, however, shows that it is not obnoxious to this criticism, as that question is plainly left by the instruction to the jury, to be determined from the evidence.

We are of opinion that under the proof, appellant was clearly liable for funeral benefits to the amount found by the verdict, and as appellee paid the same and no question is raised as to her right to bring suit, the judgment will be affirmed.

Judgment affirmed.

**Interstate Contracting & Supply Company, Appellant,
v. Belleville Savings Bank et al., Appellees.**

1. MECHANICS' LIENS, § 196*—*when evidence sufficient to sustain finding of agreement to waive liens.* In a bill by subcontractors to enforce mechanics' liens, evidence held sufficient to sustain a finding that before the making of the original contract with the owner, contractor verbally agreed to waive all liens for labor and materials.

2. MECHANICS' LIENS, § 196*—*when evidence sustains finding that original contract was oral and lien was waived.* In a bill by subcontractors to enforce mechanics' liens, evidence held sufficient to sustain a finding that the original contract was oral and that the right to a lien thereunder was specifically waived by contractor.

3. MECHANICS' LIENS, § 38*—*how question whether contract oral or written affects right to lien.* Under both the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*) and the amendments thereof enacted in 1913, no distinction is made between oral and written contracts as to the right to a lien thereon.

4. MECHANICS' LIENS, § 38*—*what constitutes verbal contract under act.* Under the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*),

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a contract is in law deemed wholly oral or verbal where it is partly oral and partly in writing.

5. **MECHANICS' LIENS, § 62***—*when subcontractor not entitled to lien.* Under the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*), a subcontractor's lien cannot be allowed if the original contract does not create a lien.

6. **MECHANICS' LIENS, § 62***—*when subcontractor not entitled to lien by original contract.* Under the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*), a subcontractor is not entitled to a lien where the original contract provides that there shall be no liens upon property for labor or material.

7. **MECHANICS' LIENS, § 4***—*to what extent act unconstitutional.* In so far as section 21 of the Mechanics' Liens Act (J. & A. ¶ 7159) attempts to give a subcontractor a lien not dependent on the original contract, such section is unconstitutional.

8. **MECHANICS' LIENS, § 136***—*what is effect of waiver in original contract on right of subcontractor to lien.* Under the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*), a subcontractor is not entitled to a lien where such lien has been waived and released by the original contractor.

9. **MECHANICS' LIENS, § 135***—*when statute requiring recording of contract waiving liens to render it effective as evidence against subcontractor inapplicable.* The Act enacted in 1913 amending section 21 of the Mechanics' Liens Act (J. & A. ¶ 7159), which amendment requires that the contract waiving liens must be filed in the office of the recorder of deeds to make it effective as evidence against a subcontractor who has no actual knowledge of the waiver, does not apply where the original contract under which the lien is sought was entered into prior to the enactment of the amendment.

10. **MECHANICS' LIENS, § 68***—*when notice by subcontractor to owner of claim for lien given too late.* The notice required by section 24 of the Mechanics' Liens Act (J. & A. ¶ 7162), to be given by subcontractors claiming a lien to the owner of the property sought to be subjected to a lien, comes too late to preserve the lien where such notice is given after the contractor has been adjudicated a bankrupt, although such notice was given within the time required by the statute.

11. **STATUTES, § 27***—*how construed when in derogation of common rights.* Statutes in derogation of common rights must be strictly construed.

12. **MECHANICS' LIENS, § 66***—*what are rights of subcontractors failing to give timely notice of liens.* Where subcontractors lose their liens by delaying to give the notice required by section 24

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of the Mechanics' Liens Act (J. & A. ¶ 7162) until after the contractor has been adjudicated a bankrupt, such subcontractors can only share the proceeds of the estate of the bankrupt with other creditors.

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

D. E. KEEFE and C. P. WISE, for appellant Samuel B. McPheeters.

F. W. MERRILLS, for appellant Cincinnati Mfg. Co.

TURNER & HÖLDER, for appellee Belleville Savings Bank.

BARTHEL, FARMER & KLINGEL, for appellee Samuel B. McPheeters.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

The Belleville Savings Bank, a banking corporation hereinafter designated as the bank, doing business in Belleville, Illinois, proposed building a new bank building in that city, and in pursuance thereof asked for bids for work and material to be used in its erection and furnishing. On July 29, 1912, the St. Louis Bank Fixture Company of St. Louis, Missouri, submitted to it a written proposal to erect and furnish certain parts of the building for \$9,489. This offer was accepted and parts of the work so contracted for were thereafter sublet by said Bank Fixture Company to certain subcontractors, one of which, the Interstate Contracting and Supply Company, was to furnish all the marble used in the building for \$1,950, with extras at the market price. Another, the Cincinnati Manufacturing Company, agreed to furnish the bronze, metal work and steel cage work for \$908.80 and still an-

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other, the Van Kannel Revolving Door Company, was to furnish and deliver a revolving door for the bank for \$665. The work and materials so contracted for were furnished and used in the bank building, and thereafter notice was served on the bank by the respective subcontractors, claiming liens therefor. On July 16, 1913, the contractor, the Bank Fixture Company, was duly adjudged a bankrupt in the United States Court for the Eastern District of Missouri. On July 17, 1913, the Interstate Contracting and Supply Company completed its contract and two days later served the notice of lien on the bank above referred to, claiming the amount of its contract price, and in addition thereto \$96.82 for extras, and on July 30, 1913, filed a bill for mechanic's lien in the Circuit Court of St. Clair county, making as defendants thereto, the bank, the contractor and the other subcontractors above mentioned. The contractor answered setting up the bankruptcy proceedings, and that Samuel B. McPheeters had been appointed trustee therein, and afterwards said trustee was substituted for said contractor as defendant. The two other subcontractors filed answers, setting up their claims for the amount of their contracts and averring that they had given proper notice to the savings bank. The bank, in its answer, set up and claimed as a complete defense to the action that a waiver of any lien for labor or materials was made by the contractor at the time the contract was entered into. It also further answered saying, that it had paid to the Bank Fixture Company, on account of said contract, the sum of \$7,477; that on the 18th day of July, 1913, before the bank received notice of any subcontractor's lien, the Bank Fixture Company was thrown into bankruptcy and was insolvent, and one Samuel B. McPheeters was appointed trustee in bankruptcy, and that the balance, \$2,012, due from the bank to said Bank Fixture Company, became due and payable to the trustee of said company.

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The cause was referred to the master to take the proofs and report the same and his conclusions. In his report he found as matters of fact, among other things, that the subcontractors furnished the work and material contracted for by them and that they had received nothing therefor; that they had served their respective notices of liens in apt time; that there was still due from the bank to the contractor \$2,012, and that the contractor by oral agreement at the time of the contract had specifically waived any right to the lien. He also found as matters of law that the amendment to section 21 of the Mechanics' Liens Law of 1913 (J. & A. ¶ 7159) providing: "If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a subcontractor or material man, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds, etc.," is not binding on the bank as to a waiver made before the enactment of said law; that on account of such waiver, none of the subcontractors can maintain their lien and that the bill should be dismissed. Objections were filed to the report, which were overruled by the master and exceptions filed thereto in the court. Upon the hearing the court overruled the exceptions, approved the report and entered an order dismissing the bill at the cost of the complainant. From the decree so entered the Interstate Contracting and Supply Company and the Cincinnati Manufacturing Company appealed, seeking to reverse the same on the ground that there was no sufficient proof of waiver by the contractor, that the court erred in holding said amendment to section 21 of the Mechanics' Liens Law did not apply to such contract of waiver if proven, and in not holding

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the \$2,012 still due on the contract should be paid pro rata among the subcontractors.

It is the contention of appellants that the proof relied on by the Belleville Savings Bank to show that there was an oral waiver of right of lien under the Mechanics' Liens Law of the State, made by the Bank Fixture Company at the time the original contract was entered into, is insufficient to establish such waiver. We find from the record that Mr. Turner, the president of the company, testified that it was verbally agreed that the "St. Louis Bank Fixture Company would waive any right to any lien it might have under the Mechanic's Lien Law of this State for payment of any material or labor furnished on that bank building." This agreement on the part of the Bank Fixture Company referred to statements made by Mr. Ruekauff, the president of the company, and it was stipulated, between counsel for parties concerned, that if Mr. Ruekauff were present he would testify as to the waiver of lien and making the contract the same as Mr. Turner did. Mr. Abend, one of the directors of the bank and a member of the building committee, testified that he was present when the contract was made, and that Mr. Ruekauff said he would waive all right to any lien for labor or material. Mr. Hilgard, the cashier of the bank, also stated: "We had no written contract and accepted this bid after Mr. Ruekauff said he would waive all liens as to material and labor. This was before any materials had been furnished or labor done, regarding these fixtures." Mr. Geil, also a director of the bank and a member of the building committee, testified that "Mr. Turner asked Mr. Ruekauff whether he would waive all liens the same as the other contractors had and Mr. Ruekauff stated 'certainly'"; also that before the contract was accepted, Mr. Ruekauff was asked whether he was willing to waive all liens, and he said "Yes sir." Appellant did not seek to contradict the statement of these witnesses

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upon this subject and we think they were sufficient to sustain the finding of the master, which was also approved by the court, that "before the acceptance of this proposition the Fixture Company and Ruekauff had verbally agreed to waive all right to any lien for labor and material that might be furnished for this building." Also the finding upon the same subject that the testimony conclusively established "that the contract of the bank with the Fixture Company was an oral one, and that the right to any claim for lien was specifically waived."

In *Stepina v. Conklin Lumber Co.*, 134 Ill. App. 173, it was held "under the Mechanic's Lien Act of 1903, no distinction is made between oral and written contracts. The rights to a lien under them are the same," and there is no reason why the same rule should not apply to the law as it now stands. In *Rittenhouse & Embree Co. v. Barry*, 98 Ill. App. 548, it was held in a mechanic's lien case that where the contract was partly in writing and partly oral, it is as a whole in law, an oral or verbal contract. In *Von Platen v. Winterbotham*, 203 Ill. 198, the doctrine was laid down that if the original contract did not create a mechanic's lien under the statute, a subcontractor's lien could not be allowed. Section 21 of the Mechanics' Liens Law of 1903, (J. & A. ¶ 7159) attempted to give the subcontractor a lien which should not be dependent upon the original contract, but since its enactment it has been held by our Supreme Court that the lien of a subcontractor can exist only by virtue of the original contract, and that where the original contract provides there shall not be any liens upon property for labor or material, the subcontractor is not entitled to any lien; also that said section, in so far as it attempts to give the subcontractor such a lien, is unconstitutional. *Kelly v. Johnson*, 251 Ill. 135; *Cameron Co. v. Geseke*, 251 Ill. 402. If therefore the rule as laid down in these authorities is to be followed, it would appear that ap-

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pellants, as subcontractors, would not under the proofs in this case be entitled to a mechanic's lien under the law for the reason that such lien had been waived and released by the original contractor. It is the contention of appellant, however, that the amendment to section 21 of the Mechanics' Liens Law of 1913, which is above set forth and which requires that the contract waiving the lien must be filed in the office of the recorder of deeds to make it effective as proof against the subcontractor, where he has no actual knowledge of such waiver, applies to this case and that by reason thereof said amended pleas cannot take advantage of such waiver in this case as against appellant. The original contract in this case, however, was entered into prior to the passage of this amendment, and the law, in force at the time when the contract was made, must be held to govern as to the right to a lien. *Eisendrath Co. v. Gebhardt*, 222 Ill. 113.

It would appear there was another reason why appellants in this case, as subcontractors, would not be entitled to the lien sought by them. It is provided in section 24 of the Mechanics' Liens Law (J. & A. ¶ 7162) as follows: "Subcontractors, or party furnishing labor or materials, may at any time after making his contract with the contractor, and shall within sixty (60) days after the completion thereof, or, if extra or additional work or material is delivered thereafter, within sixty (60) days after the date of completion of such extra or additional work or final delivery of such extra or additional material, cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner or his agent or architect, or the superintendent having charge of the building or improvement: *Provided*, such notice shall not be necessary when the sworn statement of the contractor or subcontractor provided for herein shall serve to give the owner notice of the amount due and to whom due." Appellant served the notice re-

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quired by this statute, but prior to the service of the same the St. Louis Bank Fixture Company, the original contractor, on July 16, 1913, was adjudged a bankrupt and Samuel B. McPheeters was appointed its trustee. The service of these notices was therefore too late under the holding of the Supreme Court of this State. In the case of *Ryerson & Son v. Smith*, 152 Ill. 641, Ryerson and Son were subcontractors under the Porter Boiler Manufacturing Company, who contracted to erect a stand pipe and steam drums for the Chicago Rock Island and Pacific Railroad Company and the World's Columbian Exposition Company, and before the completion of the subcontract, Ryerson & Son filed notice of lien. Prior to the filing of such notice the contractor became insolvent and made a general deed of assignment for the benefit of its creditors to William P. Smith, who, under the instruction of the County Court, proceeded to finish the work. At the completion of the subcontractor's contract, the railroad and exposition companies refused to pay the amount due. It was thereafter agreed the money should be deposited with the assignee and the subcontractors filed their petition for it in the County Court. The assignee filed a demurrer to the petition, which was sustained by the court and the petition dismissed. On appeal to the Appellate Court [51 Ill. App. 270], the order of the County Court was affirmed, and on further appeal the Supreme Court affirmed the judgment of the Appellate Court, stating in the opinion: "It is hardly necessary to say, that statutes in derogation of common right should be strictly construed. Plaintiffs in error (Ryerson & Son) could have had no liens until service of notices as required by section 30 (*Shaw v. Chicago Sash, etc., Mfg. Co.*, 144 Ill. 520; *Butler v. Gain*, 128 id. 23). Prior, however, to such service of notices, the Porter Boiler Manufacturing Company made an assignment for the benefit of its creditors. The notices, therefore, were insufficient to create liens; and es-

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pecially is this so, since it does not appear that anything was due from either the Chicago, Rock Island and Pacific Railroad Company or the World's Columbian Exposition Company at the date of the assignment. It is true that the assignee took the insolvent's estate subject to existing liens and equities, but at the time of the assignment no liens or equities existed in favor of plaintiffs in error. The persons intended to be benefited by the statute must comply strictly with all its requirements before they can have any lien." The notice required of a subcontractor by section 30 referred to in the case quoted from was in some respects similar, and the requirement in no wise stronger than that provided for by section 24 under the present law above quoted.

By their failure to serve their notice of lien prior to the contractor's assignment in bankruptcy, the subcontractors lost their right to enforce a mechanic's lien against the bank property and can only share with other creditors the proceeds of the bankrupt estate. The decree of the court below dismissing the bill filed in this case will be affirmed.

Decree affirmed.

Treece v. Reinhart-Smith Grocer Co., 197 Ill. App. 40.

Rolla M. Treece, Appellee, v. Reinhart-Smith Grocer Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. CARL E. SHELDON, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Rolla M. Treece, plaintiff, against the Reinhart-Smith Grocer Company, defendant, in the Circuit Court of Williamson county, to recover both actual and punitive damages for a wrongful attachment of personal property alleged to have been caused by defendant. The action was tried by jury which found a verdict for plaintiff for \$430. The court required a remittitur of \$180. From a judgment for plaintiff for \$250, defendant appeals.

It appeared that J. W. Bradley owned a grocery store in Herrin, Illinois, the stock being worth about \$1500, and on February 8, 1913, traded it to Rolla M. Treece, defendant taking in exchange cash and a house and two lots of land. At that time Bradley was indebted to defendant in the sum of \$475.94 for goods sold him. The trade was made on Saturday and defendant learned of the transfer by one of its salesmen. On the following Monday defendant sent W. E. Welge its credit man and treasurer from Marion, where it carried on a wholesale grocery store, to Herrin to try to collect the account. When Welge arrived at Herrin he found plaintiff in possession of the stock and that Bradley had gone. After talking with plaintiff, who had been a customer of defendant for a number of years, he returned to Marion. The next day he returned to Herrin in company with Walter W. Scaggs,

a young attorney who was occasionally employed by it to collect accounts but was not its general attorney. The two saw plaintiff at the store and the accounts do not agree as to what occurred. Plaintiff stated that Welge said to him, "I brought Mr. Scaggs with me, you can fix this matter up," and further said, "you can insure these accounts or agree to pay them, or see that they are paid and we won't attach them; if you do not, we will attach the goods and we will make what we can out of the goods"; that in the course of the conversation Scaggs said, "Rolla, you got yourself in bad; you have yourself in where you cannot pay out. If you keep out of the penitentiary you will do well." Welge and Scaggs denied making these statements and testified that they went there to find out about the trade and see if there was any way the account could be collected, but Scaggs admitted that he said, "surely this is not a fraudulent transaction; if it is, these goods are liable to attachment." Welge and Scaggs ascertained what Bradley had received, and plaintiff agreed to furnish them a description of the house and lots that evening. They also learned that Bradley had certain household goods in Herrin. They afterwards called on A. D. Morgan, an attorney, and then returned to Marion, where a writ of attachment was sworn out against Bradley by Welge, the papers being prepared by Scaggs. The writ was delivered that night to the office deputy sheriff by Scaggs, who instructed him to levy it on the household goods of J. W. Bradley. The office deputy delivered it to the sheriff, who sent it to A. Gasaway at Herrin, the deputy sheriff there. Next morning the sheriff went to Herrin and in company with Gasaway went to plaintiff's store about eight o'clock, levied on his stock, obtained the keys of the store from plaintiff, and locked it up after putting a notice of the levy on the door. The sheriff then returned to Marion and later saw Scaggs, and after talking to him, telephoned Gasaway to take down the

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notice, release the goods and give up the keys. Gasaway accordingly took down the notice and attempted to deliver the keys, but found plaintiff had left the city and he was unable to deliver them until nearly noon the next day, when plaintiff returned. Plaintiff testified that during the time his store was closed, certain fruits and vegetables froze and the rats destroyed some meal by gnawing through the sacks containing it, and that his damages amounted to \$30 or \$40. The deputy sheriff testified that Scaggs called him up over the telephone the evening before the levy was made and told him to levy on the stock of goods; that the next morning Scaggs called him again and when informed the stock of goods had been levied upon, stated that was what he wanted done. On cross-examination, however, he stated that somebody called him up in the evening over the telephone, and he understood it was Mr. Scaggs and he assumed the second conversation was also with him. Scaggs testified he did not talk to the deputy sheriff either before or after the levy, until the afternoon of the day when the levy was made, and did not tell him before or after the levy that he wanted the stock levied on; that when he learned from the sheriff the levy had been made he ordered the goods released.

Defendant attempted to prove by Welge, Scaggs and Morgan that when they were in consultation in Morgan's office, Welge told Scaggs to have the writ of attachment levied on Bradley's household goods and not to levy on the stock, but the court refused to admit this testimony. Defendant also offered to prove by several witnesses that Welge had given Scaggs positive instructions immediately before the issuance of the attachment writ, to have the same levied on the household goods of Bradley and the court excluded this testimony.

. DENISON & SPILLER, for appellant.

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NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 149*—*when principal not liable for tortious act of agent.* If an agent commits a tort by an act in excess of his authority, the principal is not liable although the tortious act was done for the supposed benefit of the principal.

2. PRINCIPAL AND AGENT, § 151*—*when principal not liable for malicious prosecution of suit by agent.* Where an agent has authority to bring suit on behalf of a principal, the principal is not liable for the malicious act of the agent in setting in motion the criminal process of the State, where such principal could derive no benefit from the legitimate result of invoking criminal process.

3. ATTORNEY AND CLIENT, § 61*—*what attorney employed to sue and collect debt without express authority may do.* An attorney at law employed to sue for and collect a debt without express or specific authority cannot lawfully do more than to obtain judgment, order execution, receive and receipt for the money collected on such execution.

4. ATTORNEY AND CLIENT, § 83*—*when attorney may not compromise claim nor receive anything but money in satisfaction.* An attorney at law employed to sue for and collect a debt without express or specific authority cannot take less than the amount due in satisfaction of the debt, nor receive anything except money in satisfaction.

5. ATTORNEY AND CLIENT, § 61*—*implied authority of attorney.* An attorney at law has no implied authority.

6. ATTORNEY AND CLIENT, § 14*—*when client liable for acts of attorney in collecting debt.* A client who employs an attorney at law generally to collect a debt is bound to answer for the acts of the attorney which are necessary for the collection of such debts.

7. ATTORNEY AND CLIENT, § 14*—*when client not liable for wrongful acts of attorney in collecting debt.* A client who employs an attorney at law to collect a debt and gives such attorney specific instructions as to the acts to be done is not liable for the wrongful acts of such attorney in collecting such debt which are contrary to his instructions and are not necessary for such collection.

8. ATTORNEY AND CLIENT, § 14*—*when attorney personally liable for wrongful acts in collecting debt.* An attorney at law who is

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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employed to collect a debt and receives specific instructions as to the acts to be done is personally liable for any wrongful acts done contrary to such instructions or not necessary for the collection of such debt.

9. TRESPASS, § 48*—*when evidence as to instructions to attorney to attach goods other than those actually attached, improperly excluded.* In an action of trespass to recover for injury sustained as a result of a wrongful attachment of plaintiff's personal property in a suit against a third person alleged by defendant to have conveyed such property to plaintiff fraudulently, where there was evidence that the officer making the attachment received telephonic instructions from one supposed to be defendant's attorney and which directed such officer to make the attachment in question, evidence that the attorney in question was specifically instructed by defendant to make an attachment of goods other than those actually attached *held* improperly excluded, such evidence being competent as tending to show the extent of the authority actually conferred on such attorney by defendant.

10. TRESPASS, § 58*—*when evidence that client instructed attorney to make attachment in different way competent on question of damages.* In an action of trespass to recover for injury sustained as the result of a wrongful attachment of plaintiff's personal property in an action against a third party, and where there was evidence that the attachment was made by direction of defendant's attorney, plaintiff claiming punitive as well as actual damages, evidence that defendant specifically instructed such attorney to make an attachment different from that actually made, *held* competent on the question of punitive damages.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kate O'Rourke, Administratrix, Appellee, v. Louisville & Nashville Railroad Company, Appellant.

1. NEGLIGENCE, § 103*—*when contributory negligence of intoxicated passenger not a defense.* In an action to recover for the death of plaintiff's intestate alleged to be due to the negligent act of defendant, contributory negligence is not a defense where it appears that at the time of such act intestate was in such a state of intoxication as to be unable to care for himself.

2. NEGLIGENCE, § 103*—*how question of contributory negligence of intoxicated passenger determined.* In an action to recover for the death of plaintiff's intestate as a result of the alleged negligent act of defendant, and where it appears that at the time of such act intestate was intoxicated, the question of contributory negligence is controlled by the degree of intestate's incapacity at such time due to the intoxication.

3. CARRIERS, § 289*—*how question of negligence towards intoxicated passenger determined.* In an action to recover for the death of plaintiff's intestate as a result of the alleged negligent act of defendant, where it appeared that at the time of such act intestate was intoxicated, the question of defendant's negligence would be controlled by the degree of intestate's incapacity at such time due to the intoxication.

4. CARRIERS, § 287*—*when abandoning passenger in dangerous position negligence.* It is negligence for the servants of a railroad corporation to abandon a passenger in a known place of danger where such passenger at the time of abandonment is bereft of reason and without intelligence sufficient to enable him to care for himself by reason of intoxication and is known by defendant's servant to be in that condition.

5. DEATH, § 21*—*when abandonment of passenger must be shown to be proximate cause of death.* In an action against a railroad corporation to recover for the death of plaintiff's intestate as a result of the alleged negligent act of defendant's servants in abandoning intestate while a passenger in a place of known danger, and when defendant's servants knew intestate was intoxicated and unable to care for himself, plaintiff in order to recover in the action must show that the abandonment was the proximate cause of the death sought to be recovered for.

6. NEGLIGENCE, § 47*—*how rules relating to proximate cause applied.* In actions involving negligence, the rule applicable to the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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determination of questions of proximate cause is the same whether the action be to recover for death or for personal injuries.

7. NEGLIGENCE, § 48*—*what constitutes proximate cause.* The proximate cause of an event is that cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which cause the event would not have occurred.

8. NEGLIGENCE, § 49*—*when negligent person not liable for act not cause of injury.* In actions involving negligence where, after one of the causes of an event has been in operation, some independent force intervenes and produces a result not the natural effect of such first cause, or where such first cause has so far exhausted itself or has been overborne by other forces as not to be deemed the legal cause of the injury, the author of the first cause is not liable, although negligent, and although an injury would not have occurred but for the negligence.

9. NEGLIGENCE, § 49*—*when wrongdoer liable for negligent injury.* A wrongdoer is liable if the injury sought to be recovered for is one which a reasonably prudent man, by the exercise of ordinary care, might have foreseen would occur, although such wrongdoer might not have foreseen the particular accident which actually occurred, but such a wrongdoer is not liable for injuries which could not have been foreseen or expected by the exercise of ordinary care.

10. DEATH, § 21*—*when negligence of carrier in leaving passenger in known place of danger not proximate cause of death.* The negligent act of a railroad company in refusing to permit an intoxicated passenger to re-enter the train after leaving it at a station was not the proximate cause of the death of the passenger where he left the station and went to a livery stable where he was taken charge of by an officer, but subsequently was released and directed to the station of another railroad company, and was killed on the tracks of such other railroad.

Appeal from the Circuit Court of Gallatin county; the Hon. E. E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1915. Reversed with finding of facts. Opinion filed December 1, 1915,

JAMES M. HAMILL and CHARLES P. HAMILL, for appellant.

PILLOW & STONE and BARTLEY & BARTLEY, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellee, the wife and administratrix of the estate of James M. O'Rourke, deceased, brought suit to recover damages for the benefit of his next of kin, for his death alleged to have been caused by the negligence of appellant. The declaration alleged that appellant's servants received appellee's intestate while he was in a drunken condition, as a passenger on its train at East St. Louis, to be transferred to Shawneetown, Illinois; that such condition was apparent and known to said servants at the time he was so received; that his state of intoxication increased after he was aboard the train and when it reached Ashley, fifty miles from East St. Louis, he had become physically and mentally incapacitated from exercising any degree of care for his own safety and that he was temporarily insane; that he was permitted to leave the train, and when he attempted to re-enter, appellant refused to allow him to do so and left him on the platform in a drunken condition at nine o'clock at night; that the place was a dangerous one, and about the hour of twelve o'clock at night, the decedent, while still in the same physical and mental condition above mentioned, was run over and crushed by one of the trains of the Illinois Central Railroad Company, without negligence or blame on the part of said railroad or any of its servants, and afterwards at four o'clock in the morning of the following day, June 27, 1913, died from the effects of said wounds; that the abandonment of the deceased, while in such helpless condition at said dangerous place, was negligence on the part of appellant and was the direct and proximate cause of his death.

A demurrer was filed to the declaration and sustained by the court. Plaintiff below abided by her declaration and judgment was entered against her for costs to be paid in due course of administration. She ap-

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pealed from that judgment to this court, where the judgment of the court below was reversed and the cause remanded. The case is reported in 183 Ill. App. 593, where a more complete statement of the pleadings may be found. In the opinion filed in that case, we held that the declaration stated a cause of action and that: "If the plaintiff was, as the declaration alleges in such a mental state of intoxication as to be incapable of caring for himself, the question of contributory negligence would not be involved in the case. The degree of incapacity from drunkenness would control the question of due care, or negligence of both plaintiff and defendant. If plaintiff was, through intoxication, so bereft of reason that he was without intelligence to care for himself, and while in that condition and known by defendant to be in that condition he was abandoned in a known place of danger where injury would be likely to result, such facts would constitute negligence." The case was redocketed and has been tried on the same declaration with a plea of general issue, resulting in a judgment and verdict in favor of the plaintiff below for \$2,000. The railroad company has appealed, contending that the evidence does not disclose a right of recovery and that the jury were improperly instructed. To entitle appellee to recover in this case, it was necessary for her to prove, (1) that deceased was so incapacitated by intoxication as to be incapable of caring for his own safety; (2) that while in such condition he was left or abandoned by appellant in a dangerous place; (3) that such abandonment was the proximate cause of his death. To these conditions appellant seeks to add a fourth, that is, that due care on the part of deceased must be proven, but this, as we have above seen, is not necessary, if appellee was incapacitated to take care of himself as charged in the declaration.

The proofs show that on June 26, 1910, appellant ran an excursion train from Shawneetown to East St. Louis

and return; that deceased, with several companions, purchased tickets at Shawneetown and went on the excursion train; that he had been drinking before he started, but acted properly on the trip to East St. Louis, where he, with others, seems to have put in the day drinking and carousing. The excursion train, as further shown by the proofs, started on its return trip at 6:25 that evening and for an hour before its departure deceased drank very heavily. He entered the train in a drunken condition, and when in the vicinity of Belleville became boisterous and ungovernable, passing through the car swearing and using obscene language, drinking out of a bottle, insisting on others drinking and insulting passengers, going so far as to pull the nose of one and put his feet up on the back of a seat occupied by a young woman, and he finally became engaged in a fight. The conductor and brakeman remonstrated with him a number of times, when he would temporarily cease his drunken acts, but would begin again as soon as the train men left. When the train reached Ashley, some fifty miles from East St. Louis at about 8:30 p. m., deceased ran through the car and jumped off, alighting backwards and partially falling. As he did so a bottle of whisky fell from his pocket, which the conductor kicked into the weeds. The conductor then offered to assist deceased, but he refused the proffered aid and cursed him. As the train started, deceased wanted to get back upon it but the conductor denied him permission to do so and the train went on leaving him standing on the platform. After the departure of the train, deceased asked appellant's night operator where the livery stable was, saying he wanted to get his horse and buggy. The operator directed him to a stable about a block away and deceased started to it, going south down the platform, across the tracks of the Illinois Central Railroad, which crosses appellant's track nearly at right angles, a short distance east of the depot of the latter,

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thence on across the street and turning south proceeded to the stable which was located about the middle of the block. A horse hitched to a buggy was tied in the stable and O'Rourke immediately climbed into the buggy and attempted to drive away. The livery man told him to get out of the buggy and he complied with this request and started down the street. The night marshal, who had been informed there was a drunken man at the livery stable, had started to that place and when close to it found deceased leaning against a wire fence. The marshal testified the man appeared to be able to take care of himself, so he directed him to go over to the Illinois Central depot, which he did. When he reached the station he stood around mumbling to himself and attracted some attention by reason of his intoxication. Nothing is known of O'Rourke or what he did, so far as the proof shows, from a short time after his arrival at the Illinois Central Station until about 11:30 p. m. when his body was found along the Illinois Central tracks, about 1,000 feet south of the place where they crossed appellant's track, with one arm and one leg cut off. He never regained consciousness and died about 4 o'clock the next morning. How he met his death was not shown, but one of the witnesses was permitted to testify that in his opinion deceased was attempting to board a southbound Illinois Central freight train that passed a short time before he was discovered and fell between the moving cars.

At Ashley, appellant's track runs nearly east and west and crosses the Illinois Central railroad's double tracks at right angles. The tracks of the latter were south of appellant's station and platform, and east of these double tracks was what was known as Railroad street. The livery stable appears to have been in the middle of the block south of appellant's track and on the east of Railroad street, it being about 350 feet from the place where deceased got off the train to the livery stable. The Illinois Central depot was on the

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east side of its tracks a short distance south of the crossing of the two roads and it was not necessary for deceased in going from the livery stable to that station to cross the tracks of either road. Whether deceased was so incapacitated by intoxication as to be incapable of caring for his own safety and whether, while in that condition, he was left or abandoned by appellant in a dangerous place, are questions which we do not propose to discuss in this opinion, but assuming that these conditions were as claimed by appellee, yet before she is entitled to a recovery in this case it must appear that such abandonment was the proximate cause of the death of her intestate.

In determining what is the proximate cause of an injury or death in cases of this kind, we do not find the rule or reasoning different from that in other cases where negligence is alleged to be the proximate cause of the injury received. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produced that event, and without which that event would not have occurred." *Wabash R. Co. v. Coker*, 81 Ill. App. 660. But if, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural or probable effect, or the cause in question has so far exhausted itself and become overborne by other forces as not to be deemed the legal cause of the injury, the author of the cause is not responsible. Bishop on Non-Contract Law, secs. 42 and 44. And this is so although the injury would never have occurred if the act of negligence complained of had not been committed. For instance, in *Wabash R. Co. v. Coker*, *supra*, the appellant stopped its cars across a public street in excess of ten minutes. Appellee and her husband in a wagon were compelled to stop, another party drove up and was compelled to stop, the noise caused by the coupling of an engine to the cars

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frightened the horse of the last party and his buggy struck appellee's wagon, injuring her. The court held that the railroad was not liable, although the accident would not have occurred in the absence of the railroad's negligence in blocking the street. The wrongdoer is to be held liable if the injury was such a one as a reasonably prudent man might, by the exercise of ordinary care, have foreseen would occur, although he might not have foreseen the particular accident that did occur, but he is not responsible for injuries which could not have been foreseen or expected. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

In *Keeshan v. Elgin A. & S. Traction Co.*, 229 Ill. 533, suit was brought against the railroad company by the administratrix of Edward J. Keeshan, and a declaration filed, charging that Keeshan was a passenger on appellant's car bound for the City of Elgin; that when he entered the car he was very much intoxicated and unable to care for himself, which was known to defendant's servant in charge of the car; that before the arrival of the car at Elgin, the defendant, by his said servant, forcibly and violently expelled said Keeshan from said car, and refused to permit him to re-enter the same; that it was nighttime, the weather was cold, the snow was falling and wind blowing very hard; that there was no shelter at said station or immediate neighborhood; that the home of Keeshan was at Elgin, five miles away; that he was still very much intoxicated and unable to care for himself; that he started to walk from said station to his home and in endeavoring to cross a bridge on Fox River, on the line of said railroad, on his way home and while using due care and caution for his own safety, he fell off or walked off such bridge into the river and his death resulted. The court sustained a demurrer to this declaration, and the plaintiff, having elected to stand by the same, judgment was entered against her for cost. The Appellate Court for the Second District affirmed the judgment of

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the trial court [132 Ill. App. 416] and the Supreme Court affirmed the judgment of the Appellate Court. The Supreme Court in the course of its opinion in that case says: "If putting Keeshan off at the time and place alleged was a wrongful act on account of the condition of the weather, the declaration shows no natural connection between that act and the consequences which resulted from his attempting to walk to his home, in his intoxicated condition, across defendant's bridge. If it was not necessary to a liability of the defendant that its servant in charge of the car should be able to anticipate the particular injury which might result from a wrongful act, still the defendant cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated. If Keeshan was expelled and left in a place where he was exposed to unnecessary peril in his drunken condition, on account of the cold and storm, there is no connection between that act and his walking or falling off the bridge."

In this case O'Rourke was not injured at the place where appellant refused to permit him to re-enter the train, but, if that place was a place of danger, he had gotten beyond and outside of it and had gone to the livery stable where there was no danger from the trains of either railroad, and immediately after he left the livery stable, when he was found by the night marshal, he was also in a place of safety. He was in fact at that time taken charge of by the officer to the extent that the officer, not considering him sufficiently intoxicated to be taken into custody, directed him to go to the Illinois Central station. Had deceased been struck by appellant's train at the place where he was abandoned, or if while leaving that place and crossing over the Illinois Central tracks to a place of safety, he had been struck by a train on one of the latter tracks, the situation would have been different and might more readily appear to have been a natural consequence re-

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sulting from his ejection from the train or the refusal of appellant to allow him to re-enter. But he had entered a zone of safety, and it does not appear that he contemplated returning to dangerous proximity of the tracks of either of said railroads, and he in fact, so far as the proof shows, never did go into immediate proximity to appellant's road, after he left its station. The reason why he went near to the Illinois Central Railroad tracks was because he was directed to do so by the marshal who sent him to the Illinois Central Railroad station. His death occurred more than 1,000 feet from where appellant left him, and resulted not from having been left by appellant, in a place of danger, but because after having reached a place of safety he afterwards went into a new place of danger or attempted a dangerous act at considerable distance from appellant's station.

We do not think it can properly be said that a reasonably prudent man could have foreseen that O'Rourke, when put off the train would, after having gone of his own motion from appellant's station to a place of safety, been directed by an officer to go to the station of another railroad, and hours afterwards been injured along the tracks of the second railroad 1,000 feet away from the place where appellant left him. It does not appear to us that there was a direct, casual relation between the act of appellant and the injury received by appellee's intestate. The judgment of the trial court will therefore be reversed.

Judgment reversed with finding of facts.

Finding of facts to be incorporated in the judgment. The court finds as a fact, from the record in this case, that the negligence of appellant charged and sought to be proven by appellee was not the proximate cause of the death of appellee's intestate.

T. P. Morey, Appellee, v. Ed Simpson, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Bond county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by T. P. Morey, plaintiff, against Ed Simpson, defendant, in the Circuit Court of Bond county, to recover on a promissory note. From an order that a judgment for plaintiff for \$2,300 and costs entered by confession should stand, defendant appeals.

It appeared that on December 7, 1912, defendant executed and delivered a note payable to the order of the Paxton-Eckman Chemical Company for \$2,200, due ten months after date, with interest at the rate of seven per cent. after maturity. A power of attorney was attached to said note, authorizing any attorney of any court of record to appear in such court in term time or vacation, at any time thereafter and confess judgment without process, in favor of the holder of the note for such amount as might then appear to be unpaid, together with costs and \$100 attorney's fees. The note was afterwards, and before maturity, indorsed in blank without recourse by the payee, and on August 25, 1913, a judgment was entered in vacation by confession in the Circuit Court of Bond county in favor of plaintiff against defendant for the sum of \$2,300 and costs. At the September Term, 1913, on motion of defendant, execution on said judgment was stayed and defendant granted leave to plead.

Defendant finally went to trial on an amended plea, alleging in substance that he bought certain stock powder from a corporation under a written contract which was set out in full, the purchase price of which was

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\$2,800, and gave the note in question in part payment, the balance being paid by the sale and delivery of a horse. The plea further alleged that after the contract was made and in consideration of the note, the payee agreed to furnish defendant with a salesman to sell some of the stock powder then on defendant's possession, and that this was the sole consideration of the note, which the payee failed to do, whereupon defendant rescinded the agreement and so notified the payee. The plea alleged that the payee agreed to this but failed to return the note, and never delivered any powder under the contract. The plea further alleged total failure of consideration and that H. H. Morey and defendant had notice of defenses, and were not innocent holders for value.

Plaintiff in his replication denied notice of defenses, and averred an indorsement to him before maturity, and that H. H. Morey had no notice of defenses when the note was indorsed to him by payee. The replication further averred that the consideration had not wholly failed, and denied that defendant's order for the stock powder had been rescinded as alleged in the plea.

At the trial below, defendant sought to show that the company, having failed to comply with its contract to furnish a man to assist in selling the powder defendant had on hand, consented to the cancellation of the contract; that by reason of such cancellation nothing was due on the note, and defendant was entitled to the possession of it; that H. H. Morey had notice of this defense when he purchased the note; that plaintiff was the father of H. H. Morey, and that the transfer of the note to him was in the nature of a fraud or subterfuge. The court held at the trial that the burden was upon defendant to establish that notice of some defense was brought home to plaintiff before he purchased the note.

It was admitted that the note was indorsed in blank by the company, and at the trial H. H. Morey testified that he gave his check to the company for the note, and

afterwards sold it to plaintiff's father, on February 27, 1913; that he, at that time, called his father up over the telephone and made the sale in that way. It appeared that the note was in possession of H. H. Morey at the time he made an affidavit as to defendant's signature, when the confession of judgment was taken, but he testified that the note had been sent back to him.

At the close of all the evidence the court on motion of plaintiff directed a verdict for plaintiff, and after such verdict was returned, overruled a motion for a new trial and made an order that the judgment by confession stand.

SMITH & FRIEDMEYER and JOHN D. BIGGS, for appellant.

C. E. HOILES, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 440***—*what degree of proof required to annul title of transferee of paper before maturity.* Only a strong case will suffice to annul the title of a transferee of commercial paper not yet due, the tendency of the courts of this state being to sustain the negotiability of such paper, and to indulge every presumption in favor of its validity.

2. **BILLS AND NOTES, § 240***—*when indorsee or assignee before maturity protected against maker.* The indorsee or assignee of commercial paper taking the same before maturity in good faith for value and without knowledge of defects is protected against the defenses of the maker thereto.

3. **BILLS AND NOTES, § 448***—*what proof required to defeat title of holder for value before maturity.* The title of the holder of commercial paper for value and before maturity can only be defeated by evidence that such holder was guilty of bad faith in taking title to such note, and it is not enough to prove the existence of mere suspicion of defects in such title or that such holder at the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Morey v. Simpson, 197 Ill. App. 55.

time of taking such title knew of facts calculated to excite suspicion in the mind of a prudent man, or even that such holder was guilty of gross negligence at such time.

4. **BILLS AND NOTES, § 412***—*when burden on one attacking title of holder to show bad faith.* Where a promissory note is in the hands of a holder for value before maturity, the burden is on one who attacks the title of such holder to show by a preponderance of the evidence that such holder was guilty of bad faith in taking title to such note.

5. **BILLS AND NOTES, § 255***—*what is basis of rule for protecting holder for value before maturity in absence of bad faith.* The rule that the maker of the note can defend against the note in the hands of a holder for value before maturity only by showing that such holder acted in bad faith in taking title to the note is based on the policy of the law giving full faith and credit to commercial paper transferred before maturity, in order that it may circulate with all the conveniences of currency as far as possible.

6. **BILLS AND NOTES, § 448***—*what does not constitute evidence of fraud.* In an action to recover on a promissory note where plaintiff is a holder for value and before maturity, and where the defense is grounded on fraud, the fact that plaintiff received the note by indorsement from his son, who in turn received it by indorsement from the payee, does not tend to show fraud, which cannot be inferred from the mere fact of the relationship, such indorser having the same right to transfer the note to his father as to any other indorsee.

7. **FRAUD, § 87***—*when not presumed.* Where the defense to an action is fraud, the fraud relied on must be proved, and cannot be presumed.

8. **BILLS AND NOTES, § 440***—*what constitutes prima facie case.* In an action to recover on a promissory note, a prima facie case is established by proof of the note showing on its face title in plaintiff.

9. **BILLS AND NOTES, § 440***—*when evidence sufficient to overcome prima facie case by proof of note.* In an action to recover on a promissory note, where plaintiff was a holder for value before maturity, and where the defense was grounded in fraud, evidence held insufficient to overcome the prima facie case established by proof of the note.

10. **BILLS AND NOTES, § 461***—*when verdict properly directed.* In an action to recover on a promissory note, where the evidence in defense is insufficient to overcome the prima facie case established by the proof of the note, it is proper to direct a verdict for plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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City of Lawrenceville et al., Appellees, v. Central Illinois Public Service Company, Appellant.

1. INJUNCTION, § 269*—*when motion to dissolve same effect as demurrer.* A motion to dissolve a temporary injunction for want of equity has the same effect as a demurrer to the bill, in so far as the injunction is concerned.

2. EQUITY, § 210*—*what questions considered on demurrer to bill.* On demurrer to a bill the court is only concerned with questions which arise on the face of the bill.

3. EQUITY, § 224*—*when matters in bill taken as true on demurrer.* On demurrer to a bill, the matters therein alleged must be taken as true.

4. INJUNCTION, § 384*—*when lack of verification of bill not objection available on review.* On appeal from an order denying a motion to dissolve a temporary injunction, the fact that the bill was not verified cannot be taken advantage of for the first time on review, where the point is not mentioned in the reasons assigned in the trial court for the motion to dissolve, and does not appear to have been raised in that court, it being an objection which could have been obviated at the hearing on the motion had objection been seasonably made.

5. INJUNCTION, § 106*—*when water company should be restrained from discontinuance of water service.* In a bill by a city and certain of its citizens to restrain a public water company from discontinuing its water service to complainants, where it appeared that defendant secured the franchise to supply water to complainant city and its inhabitants by virtue of an ordinance providing that defendant should furnish water of a certain standard of purity, and that in case defendant failed to furnish water of such standard, compensation for water furnished should be denied until the ordinance was complied with, and it further appeared that defendant failed to furnish water of the standard required by the ordinance, and that complainants refused to pay defendant's water bills, whereupon defendant threatened to discontinue furnishing water to complainants, *held* that complainants were entitled to the relief prayed for, it being inequitable to permit defendant to reap the benefits conferred on it by the ordinance without complying with such terms thereof as were for the benefit of the city and its inhabitants.

6. EQUITY, § 1*—*when relief for grounds appearing on face of bill should be granted.* Where it appears on the face of the bill

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that complainants are entitled to the relief prayed for, such relief must be granted unless a court of equity has no power to grant such relief.

7. INJUNCTION, § 106*—*when equity jurisdiction to grant temporary injunction against discontinuance of water service.* In a bill to restrain a public water company from discontinuing its water service for failure to pay water bills, where it appeared that the ordinance under which defendant secured the right to furnish water to complainants provided that defendant should be denied compensation for water furnished in case it failed to furnish water of a certain standard of purity, a temporary injunction granting the relief prayed is proper, notwithstanding the provisions of the Public Utilities Commission Act, creating such commission and giving it jurisdiction over the equipment, appliances, facilities and service of public utilities, such injunction having nothing to do with the selection of a source of water supply, nor the installation of equipment for efficient service, and merely restraining an inequitable act, it appearing that defendant did not furnish water of the standard of purity required by the ordinance.

Appeal from the Circuit Court of Lawrence county; the Hon. E. E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

VAUSE, HUGHES & KIGER, for appellant.

B. O. SUMNER, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

This is an appeal from an order overruling a motion to dissolve a temporary injunction granted by the master in chancery of the Circuit Court of Lawrence county, on January 27, 1915, restraining appellant from discontinuing its public water service to certain inhabitants of the City of Lawrenceville, Illinois, who had refused to pay their water bills, until the further order of the Circuit Court of said county. The bill upon which the restraining order was issued was filed by the City of Lawrenceville and a number of its citi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

zens, and sets out the ordinances passed by the city and accepted by appellant, under which the latter was furnishing water for public and private use throughout the city. One of said ordinances, known as No. 243, provided, as set forth in full in the bill, among other things, for the equipment and installation by the water company, of an improved and adequate filter system, known as the Mechanical-Chemical Filter system, and sections 3 and 4 of such ordinance were in the following language:

“3. The Lawrenceville Light and Water Company, its successors or assigns, shall, before it begins the furnishing of filtered water so taken as aforesaid, to the inhabitants of said city, and every ninety days thereafter, furnish to the city council an analysis made by some competent chemist selected or approved by said city, with his certificate of such analysis thereto attached of the water furnished to the inhabitants of said city through the said filter system, and if from said analysis said water so furnished as aforesaid, does not appear to be reasonably pure for domestic and drinking purposes, the said Light and Water Company, its successors and assigns, shall immediately take steps to repair their said filter system or make such changes therein as will render the water furnished by it reasonably pure for domestic and drinking purposes.

“4. If upon such analysis made by a competent chemist or board of chemists selected by said city, at any time, it shall appear that the water which is being furnished to the inhabitants of said city for domestic and drinking purposes is not reasonably pure, written notice of such fact shall be given to the said Light and Water Company, its successors and assigns, and if the said Light and Water Company, its successors and assigns, shall not within thirty days thereafter repair, remodel or change its said filter system so as to provide reasonably pure water for domestic and drinking

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purposes then said company or its successors or assigns, shall not be entitled to receive any further pay from said city or any inhabitant or consumer of water on account of any water furnished said city or any consumer or inhabitant until such changes or repairs shall have been made; and if said repairs or changes are not made by said Light and Water Company to its said filter system within ninety days from the receipt of said notice, all the rights and privileges granted to said Light and Water Company, by this ordinance or by its original contract or franchise with said city, under which it is now furnishing water to said city and the inhabitants thereof, shall cease and terminate and thereafter be null and void."

This ordinance as it appears from the bill was after its passage, by the city, accepted by the Lawrenceville Light and Water Company, February 18, 1900, and subsequently the rights and privileges vested in said Light and Water Company were duly assigned to appellant here. It is further alleged in the bill that on August 20, 1913, and for a long time prior thereto, appellant had been furnishing to the city and its inhabitants water of a kind and quality wholly unfit for drinking purposes, and that prior to that date said city had caused an analysis of such water to be made by a competent chemist and that the analysis so made shows such water to be wholly unfit for many domestic uses and for drinking purposes and not reasonably pure for such purposes; that the city council on August 19, 1913, passed a resolution reciting that as the State water survey had analyzed certain samples of water taken from the mains and reported it unfit for drinking purposes and not the kind of water which appellant was required to furnish, that in pursuit of said ordinance No. 243, a notice be served on appellant which was in the words and figures following, to wit:

"To the Central Illinois Public Service Company:
You are hereby notified that samples of water taken

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from the public mains of said City of Lawrenceville, Illinois, which water was furnished by you to the inhabitants of said city for domestic and drinking purposes and submitted to the Illinois State Water Survey for examination and analysis, has been reported by said Illinois State Water Survey to be unfit for drinking purposes. You are further notified to repair, remodel or change your filter system so as to provide reasonably pure water for domestic and drinking purposes, within thirty days from this date, and for failing so to do the provisions of said ordinance will be strictly enforced against you." That after the service of said notice on it, appellant failed to furnish said city and its inhabitants with the kind and quality of water it was required to furnish under said ordinance and that the water it did furnish was wholly unfit for drinking purposes; that it was salty, unsanitary, odorous, unpleasant to the taste, turbid and contained organic matter and disease germs and was only fit for use in bath tubs, sinks, water-closets and in steam and hot water pipes, and for laundry purposes; that after the service of such notice, appellees and many others of the inhabitants of said city refused to pay for water furnished them, for the reason that the same was impure and not the kind to be furnished under said ordinances, and that they still refused to pay for the same for such reasons; that appellant notified appellees and others that if their water rentals were not paid and settled by January 25, 1915, it would discontinue the supplying of water to such as refused to pay their water rentals and is threatening to cut off the water supply of appellees and others who have refused to pay; that appellees have no means of supplying themselves with water for their bath tubs, water-closets, sinks and laundry and steam heating purposes other than the water furnished by appellant; that they and each of them have at all times been ready and willing and are now ready and willing to pay appellant for

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water of the kind and quality required to be furnished by said ordinances; that they believe appellant will cut off the water supply of appellees and all others who refuse to pay, unless restrained by the injunctive order of the court, and that irreparable damage and injury will result thereby to appellees and all other inhabitants of said city who are consumers of water furnished by appellant.

The prayer of the bill, so far as it relates to a temporary injunction, was that a writ be directed to appellant, restraining it from discontinuing water service to appellees and all other inhabitants of the city who are consumers of water furnished appellant, and from cutting off the supply furnished by it to appellee or any of the inhabitants of said city who are consumers of water on account of their not paying their water bills for water used since the expiration of thirty days after August 20, 1913, until the further order of the court. Four reasons were stated by appellant why the injunction should be dissolved, and its motion presented for that purpose. They were that (1) there was no equity on the face of the bill; that (2) the State Public Utilities Commission had exclusive jurisdiction over the quantity and quality and efficiency of any commodity furnished by any public utility authorized to do business in the State; that (3) since the 1st day of January, 1914, the State Public Utilities Commission has had exclusive jurisdiction to determine what improvements and extensions can and shall be made in its plant or service station in said city, and that until an order of convenience and necessity is made and entered by said commission, appellant is without power to change or enlarge its filter system; that (4) it does not appear from the face of the bill that any order of convenience or necessity has been made by said commission or that appellant has ever refused to obey any order or direction made by the commission relative to the subject-matter. A motion to dissolve a temporary injunction

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for want of equity has the same effect, so far as the injunction is concerned, as a demurrer to the bill. *Williams v. Chicago Exhibition Co.*, 188 Ill. 19. We are therefore only concerned with questions which arise upon the face of the bill, and matters alleged therein must for the purposes of the motion be taken as true.

Appellant raises the question that the bill was not verified, but that question is not mentioned in the reasons assigned by appellant for the dissolution of the injunction and does not appear to have been raised at all in the court below, and being an objection which could have been obviated on the hearing, the question cannot be raised for the first time here. *St. John v. President & Trustees of Village of North Utica*, 157 Ill. App. 504. The question of equity raised on the face of the bill concisely stated is, can appellant, after engaging to furnish the city and its inhabitants with water and agreeing that the same should not be paid for, when not fit for drinking and domestic purposes, cut off the supply if payment is refused therefor, although it is shown that the same is not of the quality agreed to be furnished, the inhabitants being ready to pay for the same, when of a proper quality and fit for drinking and domestic purposes. The furnishing of water of the quality named in the ordinance was one of the considerations for the granting of the ordinance to appellant, and by that ordinance it gained certain privileges. It would therefore be manifestly inequitable to permit appellant to continue to reap the benefit of the privileges conferred upon it by the ordinance, without complying with those terms of the same instrument which were for the benefit of the city, and its inhabitants. It would appear clear, therefore, that upon the face of the bill, appellees were equitably entitled to the relief sought for and that such relief should be granted unless some reason exists why a court of equity has no power to grant such relief. Appellant insists that there is a reason why a court of

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chancery cannot grant relief of this kind and that the same is afforded by the act providing for the regulation of public utilities and creating a State Public Utilities Commission, in force July 1, 1914. That act provides, sections 49 and 50, that whenever a commission, after hearing had upon its own motion or upon complaint, shall find that the equipment, appliances, facilities or service of any public utility are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient equipment, appliances facilities, service or methods to be observed and shall fix the same by order, decision, rule or regulation. Also that: "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, * * * to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order."

Counsel for appellant state that the only question is, in what forum shall the controversy be settled. They also say: "The judge of the Circuit Court of Lawrence County, sitting as a chancellor, has no power to select a suitable source of water supply and order the defendant to install any particular kind of equipment to give efficient service. The General Assembly has vested that power only in the Utilities Commission." Also that: "The State Public Utilities Commission is the only forum that has jurisdiction of the subject-matter of this controversy and is the only forum vested with requisite power and authority to make the neces-

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sary orders for the protection of the rights and property of the respective litigants." We think counsel misconceived the scope of the bill and of the injunction granted in pursuance thereto. The prayer for a temporary restraining order was that appellant be restrained from discontinuing service of water to the complainants and all other inhabitants of said City of Lawrenceville, who are consumers of water furnished by appellant, and from cutting off the supply furnished by it to complainants or to any of the inhabitants of said city who are consumers of water furnished by said company, "on account of their not paying water bills rendered by said company for water used since the expiration of thirty days next from the 20th of August, A. D. 1913, until the further order of this court," and the temporary injunction was in accordance with the prayer of the bill. The prayer of the bill and the injunction issued have nothing to do with the selection of a suitable source of water supply for the city or the installation of equipment of any kind to give efficient service. The bill simply asks that appellant be restrained from discontinuing its water service to complainants and the other inhabitants of the city, who are consumers of water furnished by it on account of their not paying their water bills, until the further order of the court. This restraining order only required appellant to continue furnishing water to those theretofore entitled to its use in accordance with the terms of the ordinance which granted them their franchise, until some further order should be entered by reason of a hearing of the case and determination thereof or for some other sufficient reason appearing in a proper proceeding in the course of the suit. It may be that proper steps may be taken by the parties to raise the questions here presented by appellant upon the trial of the main case before the chancellor, but they do not appear to us to arise here, and in our opinion the order of the

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court below, overruling the motion to dissolve the temporary injunction, should be and it accordingly is affirmed.

Affirmed.

**United States Operating Company et al., Appellees, v.
James H. Finch et al., Appellants.**

1. MORTGAGES, § 503*—*when evidence sufficient to sustain finding that mortgagee indebted to mortgagor on cross-bill by creditors.*

Where a mortgagee in a bill against the mortgagor corporation obtained a decree for the full amount of his mortgage debt and interest, and a cross-bill was filed by creditors of the mortgagor corporation, which had become insolvent, for the purpose, *inter alia*, of recovering money misappropriated, and it appeared that complainant in the original bill in making the mortgage loan to the corporation had borrowed money from a bank, and that while complainant was secretary of such mortgagor corporation a check was drawn on its funds which was used to pay the interest on plaintiff's mortgage, and it further appeared that in foreclosing his mortgage complainant made no allowance for this payment, *held* that a finding on the cross-bill that complainant was indebted to such mortgagor corporation for the amount of such payment was proper.

2. CORPORATIONS, § 319*—*when cross-bill sufficient to sustain decree against officers for money illegally received.* In a cross-bill by creditors of an insolvent corporation joining as defendants, among others, certain officers of such corporation, an allegation that defendants "paid themselves divers and sundry large sums of money and gave nothing to the corporation in return," together with a prayer that the officers of such corporation be ordered to account for all sums of money and property received by them as such officers, and a stipulation that the case be decided on its merits, *held* sufficient to sustain a decree against such officers for the amounts illegally received by them as such officers.

3. COSTS, § 64*—*when decree that all defendants pay all costs inequitable.* In a cross-bill by creditors of an insolvent corporation

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to fix the liability of stockholders for unpaid subscriptions of stock, and to recover money misappropriated by those in control of the corporation, where separate judgments were entered against five defendants, each based on some matter distinct from the claims against the other defendants, some of the judgments being for large and some for small amounts, a decree that all defendants pay all the costs of suit *held* improper and inequitable as against the defendants against whom small judgments were rendered.

Appeal from the Circuit Court of Edwards county; the Hon. JAMES R. CREIGHTON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed in part, reversed in part and remanded with directions. Opinion filed December 1, 1915.

THEODORE G. RISLEY and E. B. GREEN, for appellants.

H. J. STRAWN and S. E. QUINDRY, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellant James H. Finch filed a bill against the Edwards Vitrified Brick and Sewer Pipe Company, a corporation, to foreclose two mortgages. The court found he had a lien upon the mortgaged premises for the full amount of the first mortgage but that the second one was given at a time when the corporation was insolvent and should be paid pro rata with other creditors, and a decree was entered in accordance with such findings. The United States Operating Company, The American Clay Machinery Company and George Stroup, who were creditors of the corporation, filed a cross-bill, which was afterwards, by leave of court, amended. The purpose of this amended cross-bill was to determine and fix the liability of stockholders in said defendant corporation, for unpaid subscriptions of stock of the corporation and for the misappropriation of money belonging to the same by those in control thereof. A large number of parties were made defendants to the cross-bill, among them being James H.

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Finch, the complainant in the original bill, S. A. Zeigler and H. L. Zeigler, who are appellants here. The cross-bill having been answered, the cause was referred to a special master, who made his report and the complainants in the cross-bill filed exceptions thereto. Thereafter a written stipulation was filed in the case, whereby it was provided, among other things, that the cause be "submitted to Honorable J. R. Creighton to be heard on exceptions to the report of the special master in chancery, filed by complainants in the cross-bill to said report at Carmi, Illinois, in vacation and after disposing of such exceptions to be further heard as to all other questions arising in such case as are consistent with the rules of chancery practice so that the case is to be decided upon its merits." The case was so heard and the court sustained the objections to the report of the special master and found in favor of certain defendants and that certain others were indebted to the corporation in large amounts for unpaid stock. The court also found among other things that appellant J. S. Finch was indebted to Edwards Vitrified Brick and Sewer Pipe Company, the original defendant, in the sum of \$150 for interest paid by said company for his use and benefit; that appellant S. A. Zeigler was indebted to said original defendant company in the sum of \$160 for money illegally paid him as salary, as secretary of the board, and that appellant, H. L. Zeigler was indebted to said company in the sum of \$105 for money unlawfully paid him as salary as secretary of the board of directors. It was separately decreed that each one of said three last mentioned parties pay to said original defendant company the amount due it as aforesaid, and also that each pay the costs of suit. Said James H. Finch, S. A. Zeigler and H. L. Zeigler alone appealed.

It is insisted by appellants that there is not sufficient evidence to support the finding against appellant Finch

and that as to the other appellants, the allegations of the bill are not sufficient to permit a recovery, and it is also urged by each of the appellants that it was error to enter a decree against him for all the costs. It appears that appellant Finch, in making his loan to the Sewer Pipe Company, had borrowed money from the Poseyville Indiana Bank and that, while he was acting as secretary of the company, a check was drawn on its funds which was used to pay interest on the amount due from Finch to said bank; that when Finch's mortgage was foreclosed, he obtained a decree for the full amount of the principal and interest due him and did not allow credit for the \$150 for the interest paid for him by the Sewer Pipe Company to the bank; and under these circumstances, the chancellor properly found that he was liable to said corporation for such amount so paid for him. While there was no specific charges in the cross-bill that appellants S. A. Zeigler and H. L. Zeigler had wrongfully been paid the amounts found by the court to have been illegally received by them while they were respectively acting as secretary of the board, yet it was charged therein that they and the other defendants "paid themselves divers and sundry large sums of money and gave nothing to the corporation in return," and the prayer of the cross-bill was that the officers of said Sewer Pipe Company be ordered to account for all sums of money and property received by them as such officers. We are of opinion that this allegation and prayer, taken in connection with the stipulation providing that the case was to be decided upon its merits, were amply sufficient to support the decree against these two appellants. In the course of the decree it was found that other defendants in the cross-bill were indebted to said Sewer Pipe Company in the total sum of over \$30,000, that a receiver be appointed for the company to collect and assemble all the judgments and other claims in its favor and to bring said proceeds into court, and that other

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relief prayed for in the cross-bill be granted. Separate judgments were entered against five different defendants, each judgment being based on some matter distinct from the claims against the others. It is therefore improper and inequitable that appellants who are found to be indebted in such small amounts should each be ordered to pay all the costs of suit. We are of opinion that each of the five defendants who were decreed to make payments to said Sewer Pipe Company should have been ordered to pay one-fifth of the costs, and that in all other respects the decree was correct.

The decree will be reversed and the cause remanded with directions to the court below to modify the same, by providing that each of said five defendants who were decreed to make payments to said company be also decreed to pay one-fifth of the costs of suit.

Decree affirmed in part and reversed in part and remanded with directions.

Carrie Arnold, Appellee, v. City of Centralia, Appellant.

1. *Moss—when evidence sufficient to establish injury to property by mob.* In an action against a city under Hurd's Rev. St., ch. 38, sec. 256a (J. & A. ¶ 3917), to recover three-fourths of the value of property injured by a mob, evidence *held* to show that the injury sought to be recovered for was done by a mob within the meaning of section 256s of the same chapter (J. & A. ¶ 3911), defining a mob to be "any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers over any person or persons by violence, and without lawful authority."

2. *Moss—when evidence sufficient to sustain verdict for injury to property by mob.* In an action against a city under Hurd's Rev. St., ch. 38, sec. 256a (J. & A. ¶ 3917), to recover three-fourths of the damage to property injured by a mob, where it appeared that the assemblage of persons whose acts caused the injury was a mob within the meaning of section 256s of the same chapter (J. & A. ¶ 3911), evidence *held* to entitle plaintiff to recover.

3. *Moss—when instruction as to right of recovery for injury to property by mob not prejudicially erroneous.* In an action against a city under Hurd's Rev. St., ch. 38, sec. 256a (J. & A. ¶ 3917), to recover three-fourths of the damage done to property by a mob, an instruction that plaintiff's right of recovery would not be "affected by the negligence of the city in preventing damages being done" to plaintiff's property, *held* not sufficiently faulty to warrant a reversal, although inartificially drawn and not sufficiently guarded.

4. *Moss, § 3*—when city liable for injury to property by mobs.* Hurd's Rev. St., ch. 38, sec. 256a (J. & A. ¶ 3917), providing that a city or county shall be liable for three-fourths of the value of property destroyed therein by mobs and riots, is not based on any elements of negligence on the part of the city in failing to disperse the mob or to prevent injury to property, and a recovery may be had where the evidence warrants such recovery regardless of any question of negligence.

Appeal from the Circuit Court of Marion county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Arnold v. City of Centralia, 197 Ill. App. 73.

W. G. MURPHEY and S. L. DWIGHT, for appellant.

L. B. SKIPPER and G. F. MERION, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellee sued appellant for injuries to a house she owned in Centralia, Illinois, seeking to recover under section 256a, ch. 38, Rev. St. (Hurd's 1912, J. & A. ¶ 3917) which provides that: "Whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." To the declaration filed, the general issue was pleaded and there was a verdict in favor of appellee for \$60. A remittitur of \$3.75 was entered by appellee, and a motion for a new trial having been denied, judgment was given against appellant for \$56.25. Appellant seeks to reverse the case, contending that under the evidence there is absolutely no liability on its part and the court should have given a peremptory instruction in its favor at the close of all the evidence; that the court erred in refusing its motion to set aside the verdict and grant a new trial; that the verdict is contrary to the law and the evidence, and that the sixth instruction given for appellee was erroneous, because it assumed negligence on the part of appellant.

The real ground of reversal urged by appellant, which includes all the contentions above referred to except that relating to appellee's sixth instruction, is that the proofs do not show the injury to the property to have been caused by a mob composed of twelve or more persons. It is not questioned on this appeal

that the property was injured or that the amount allowed is too large if a recovery is proper. According to the proofs, a family by the name of Bryant lived in a tenement house owned by appellee in said city, and a negro named Sherman stayed with them. Fred Reid, a policeman, had a criminal warrant for Sherman and went to Bryant's house to arrest him. Sherman came to the door and on pretense of getting his hat stepped back, got a gun and fired at Reid, wounding him severely, and then hid in the house. Reid managed to get word to the chief of police, who came with a deputy sheriff, one Guy Livesay, whom he had deputized. They entered the house, and Sherman, who was concealed under a bed, fired upon them when he was discovered, breaking Livesay's leg. Immediately after this, the chief of police and a constable, named Watts, deputized a number of citizens from the crowd which had been attracted by the firing of the revolvers, and had assembled in that vicinity, and made arrangements to capture the negro. There were some twelve or thirteen persons in all who were deputized, and they, with others, began shooting through the doors and windows and all parts of the house with guns and pistols, seeking to either hit Sherman or run him out, directions being given by some one in authority to shoot him if he appeared. Threats of hanging the negro were made and application was made to appellee for permission to burn the building, which she refused. Several hundred people gathered on the scene and the shooting lasted for two or three hours before the negro surrendered. The evidence for appellee showed shooting was general by men and boys and that it came from all directions; that first one and then another would fire regardless of whether he was deputized or not, while the proof on the part of appellants tend to show that the injury was done by the shooting of officers and those who had been deputized to assist them, alone.

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Paragraphs of section 256s, ch. 38, Rev. St. (J. & A. ¶ 3911), above referred to, provides that: "Any collection of individuals, five or more in number, assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers over any person or persons by violence, and without lawful authority, shall be regarded and designated as a 'mob.'" That threats of burning the house and hanging Sherman came from among those who were not deputized is well proven, and we find ample proof that others than those deputized assisted in inflicting the injuries complained of by shooting. Regardless of the question whether, under the law, the city would be liable for injuries inflicted upon appellee's property by officers and those deputized, under the circumstances mentioned, yet the proofs here show that a mob, as defined by the statute, had collected around appellee's premises and that the persons composing such mob indiscriminately assisted in inflicting the injury complained of. We are of opinion that under the proofs, appellant was liable for three-fourths of the injury to appellee's property, by virtue of the statute upon which the suit is based.

The sixth instruction, given for appellee, told the jury: "If you believe from the evidence in this case that the plaintiff is entitled to recover, then such right of recovery would not be affected by the negligence of the city in preventing damages being done to the property in question, provided the plaintiff herself was not negligent or careless in permitting such damages to be done, as it is no defense to an action for damages that the city could not have prevented the injury or destruction of the property." The criticism made by appellant of this instruction is that it assumes the city was guilty of negligence in not preventing damages being done to the property in question. The instruction was inartificially drawn and might properly have been

more carefully guarded, but the fault it contains was not of sufficient importance to warrant a reversal of the judgment for that reason. The question as to whether the city was negligent or not was wholly immaterial in this case, as the liability imposed by statute is not based upon any elements of negligence on the part of the city, and recovery may be had in a case where the evidence otherwise justified it wholly, regardless of the fact whether the city or its officers were or were not guilty of negligence in failing to disperse the mob or prevent injury to property. *Sturges v. City of Chicago*, 237 Ill. 46.

The record discloses no substantial reason why the judgment in this case should be reversed and the same is therefore affirmed.

Judgment affirmed.

MR. JUSTICE McBRIDE having tried this case in the court below, took no part in the case here.

The People of the State of Illinois ex rel. J. W. McGinnis and D. E. Pate, Defendants in Error, v. E. A. Paynter, Plaintiff in Error.

1. MUNICIPAL CORPORATIONS, § 41*—*what power possessed to enact ordinances.* A village board can enact ordinances only when empowered thereto by statute.

2. MUNICIPAL CORPORATIONS, § 112*—*how village marshal must be appointed.* Under section 11 of article XI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1528), providing for the appointment of village officers, the power to appoint a village marshal is in the president and the board of trustees, and the president acting alone has no such power.

3. MUNICIPAL CORPORATIONS, § 85*—*when ordinance giving village president power to appoint village marshal illegal.* On quo warranto to oust respondent from the office of village marshal, to which it appeared that respondent had been appointed under an ordinance providing that "the president shall annually appoint a chief of police by and with the consent of the board of trustees," an appointment of respondent as village marshal by the village president without the concurrence of the board of trustees *held* without effect, such ordinance being illegal under section 11 of article XI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1528), in so far as such ordinance tended to give a village president, acting alone, power to make the appointment of respondent as village marshal, the statute giving such power to the president and board of trustees.

4. OFFICERS, § 23*—*when right of officer to hold over dependent upon proper appointment under statute.* The right of a village officer appointed under a village ordinance enacted under authority of section 11 of article XI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1528), to hold over after the expiration of the term of office of such officer until the appointment and qualification of his successor, depends on the question whether the provisions of the statute were observed in making the appointment of such officer.

5. MUNICIPAL CORPORATIONS, § 120*—*when bond of village marshal does not comply with statute.* In quo warranto to oust respondent from the office of village marshal, where it appeared that the bond filed by respondent on his appointment to the office in question was payable to the People of the State of Illinois; that it bore an indorsement "approved by me this 9th day of May,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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A. D. 1913. H. P. Morgan, president. T. J. Dunn, Clerk"; that the bond was never approved by the village board of trustees, nor was the amount of the bond fixed by ordinance or resolution, held that respondent's bond was not in compliance with section 4 of article VI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1347), providing that such officers before entering on their duties shall "execute a bond to be approved by the * * * board of trustees, payable to the * * * village, in such penal sum as may, by resolution or ordinance, be directed."

6. MUNICIPAL CORPORATIONS, § 120*—*how bonds of village officers must be approved to comply with statute.* Under section 4 of article VI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1347) providing that certain village officers shall, before entering on the duties of their offices, "execute a bond with security, to be approved by the * * * board of trustees," the approval by a majority of such board of the bond filed by such officers is necessary in order to invest such officers with title to the offices to which they are appointed, and the approval of such bonds by the village president acting alone is not a compliance with the statute.

7. MUNICIPAL CORPORATIONS, § 114*—*when village marshal failing to furnish proper bond not invested with title de jure to office.* A village marshal whose bond is not in compliance with section 4 of article VI, part I, of the Cities, Villages and Towns Act (J. & A. ¶ 1347), is never invested with his office *de jure*, although during the term for which he was appointed such officer holds the office and exercises its functions *de facto*.

8. QUO WARRANTO, § 53*—*what evidence necessary to sustain plea of justification.* On quo warranto to oust a person holding an office, a plea of justification can only be sustained by proof of respondent to hold the office in question *de jure*, and it is not enough to show that respondent held the office and exercised its functions *de facto*.

9. QUO WARRANTO, § 56*—*when judgment of ouster proper.* On quo warranto to oust a person holding an office, a judgment of ouster is proper where respondent fails to sustain his plea of justification with proof that he holds the office *de jure*.

Error to the Circuit Court of Franklin county; the Hon. E. E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

W. G. MURPHEY and W. P. SEEGER, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. F. SPILLER, for defendants in error; W. H. HART, of counsel.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

This was a quo warranto proceeding brought by the State's Attorney of Franklin county on the relation of J. W. McGinnis and D. E. Pate against E. A. Paynter, plaintiff in error, to oust him from the position of chief of police or marshal of the village of Sesser in said county. A jury was waived and the court found the issues for the relator, and entered judgment against Paynter, ousting him from said office. Plaintiff in error filed a plea of justification to the information, alleging that prior to the filing of the information he was duly appointed, confirmed and selected by the president of the board of trustees and the village trustees of the village of Sesser, as chief of police or village marshal, according to law; that he accepted the assignment, qualified for the same, took oath and gave bond therefor and was duly commissioned; that he entered upon the duties of his office and served in that capacity and still continues to hold said office by virtue of said appointment; that he has never resigned from said office, has never been removed therefrom according to law, that no successor has been duly appointed, confirmed, qualified and commissioned as required by law; that by this warrant he has held and executed, during the time mentioned in the information, and still holds and executes said office as he well might.

Plaintiff in error was appointed chief of police or village marshal for said village by the president and was confirmed by a majority of the village board at the first meeting thereof in the municipal year in May, 1913. He claims that he gave bond, took the oath of office and was duly commissioned as such officer. At a regular meeting of the board in May, 1914, the presi-

dent of the board of trustees again assumed to appoint Paynter as chief of police or village marshal, but a majority of the board of trustees refused to confirm or approve the appointment. The petition for leave to file an information in the nature of a quo warranto was filed June 6, 1914, and the trial was had on the 17th day of the following September. At the times covering the appointments of Paynter, as aforesaid, the village of Sesser had the following ordinance: "Section 54. The president shall annually appoint a chief of police or village marshal, by and with the advice and consent of the board of trustees. Said chief of police or village marshal shall hold his office for the term of one year unless discharged for cause, and until his successor is duly appointed, confirmed and qualified." It was under this ordinance that the president of the board claimed the right to make the appointment. The village board could pass only such ordinances as they were given power to enact by statute. Section 11 of article XI of the statute in relation to Cities, Villages and Towns (J. & A. ¶ 1528) provides: "The president and board of trustees may appoint a clerk pro tempore, and whenever necessary to fill vacancies; and may also appoint * * * a village marshal, and such other officers as may be necessary to carry into effect the powers conferred upon villages, to prescribe their duties and fees, and require such officers to execute bonds as may be prescribed by ordinance." Under this statute the power to appoint the village marshal was in the president and board of trustees jointly, and the president alone had no power to make such appointment. *Rowley v. People*, 53 Ill. App. 298; *McKean v. Gauthier*, 132 Ill. App. 376; *People v. Hitchcock*, 148 Ill. App. 456. Therefore the attempted appointment of Paynter as marshal, made by the president of the board in 1914 and not concurred in by the board, was without force and effect and the ordinance, so far as it may tend to give the president alone power to make

the appointment, was illegal. It is claimed however, by counsel for plaintiff in error, that even if this were so, yet that Paynter was legally appointed chief of police or marshal in May, 1913, and that he qualified and was commissioned according to law, that therefore he was entitled to hold his office until his successor was duly appointed, confirmed, qualified and commissioned, and that no successor having been so appointed and qualified, he is still entitled to hold the office. The right of Paynter to hold over under the appointment made in 1913 depended upon whether the provisions of the statute were fully complied with on that occasion.

Section 4 of article VI of the statute in relation to Cities, Villages and Towns (J. & A. ¶ 1347) provided, among other things, that all city or village officers, except aldermen and trustees, should "before entering upon the duties of their respective offices, execute a bond with security, to be approved by the city council or board of trustees, payable to the city or village, in such penal sum as may, by resolution or ordinance, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village, * * * which bond shall be filed with the clerk." It appears that Paynter's commission was issued two days before he took the oath of office and executed the bond, but a more serious matter is that the bond executed by him did not comply with the provisions of the statute. Instead of being made payable to the city or village as provided by law, it was made payable to the People of the State of Illinois. It also appears that there was no resolution or ordinance fixing the amount of the bond to be given by the marshal, and Paynter's bond does not appear to have been approved by the board of trustees as required by law. The indorsement upon it in this regard is, "Approved by me this 9th day of May, A. D. 1913. H. P. Morgan, President. T. J. Dunn, Clerk."

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The appointment of Paynter and the proper approval of his bond were both necessary to invest him with the office of chief of police or marshal, and his bond could not be approved except by a majority of the board of trustees. *Launtz v. People*, 113 Ill. 137. As Paynter failed to file the bond required of him by statute, before he could enter upon the duties of his office, and the same was not approved as required by law, he was as a matter of fact never properly invested with his office. While he was no doubt during the term he served a *de facto* officer, yet this suit is one brought to directly attack his right to the office, and before he can sustain his plea of justification and right to the office he must show that he was a *de jure* officer. *Crook v. People*, 106 Ill. 237; *People v. Karr*, 244 Ill. 374. He failed to do this and the court below properly gave judgment of ouster against him.

Judgment affirmed.

Mary E. Bell, Administratrix, Appellee, v. East St. Louis & Suburban Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Mary E. Bell, administratrix of the estate of John Bell, deceased, plaintiff, against the East St. Louis & Suburban Railway Company, defendant, in the Circuit Court of Madison county, to recover for the death of plaintiff's intestate by reason of the wrong-

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ful act of defendant. From a judgment for plaintiff for \$2,250, defendant appeals.

In 188 Ill. App. 350, a former judgment in this action was reversed by this court.

On January 29, 1913, at about three o'clock in the afternoon, John Bell, while delivering goods with a wagon drawn by a mule team, in Collinsville, Illinois, was run into by one of defendant's cars and so injured that he died about six days afterwards, and from that judgment the defendant has again appealed, contending that the judgment was contrary to the weight of the evidence, and that the court erred in the admission of certain evidence offered by appellee.

It appeared that at the time of the injury Bell was on his way to deliver goods to a Mrs. Johnson, who lived on the south side of Main street in Collinsville, in the second house west of Guernsey street, and that defendant has a single track for electric cars along the center of Main street, which runs east and west. Bell was going west along Main street and one of defendant's cars was behind him going in the same direction. After passing Guernsey street which crossed Main street at right angles near Mrs. Johnson's the wagon in which he was riding, being then upon the railroad track, was struck by defendant's car and Bell was thrown out and received the injuries resulting in his death. Plaintiff claimed that the deceased was in the exercise of due care and was at the time driving west with one wheel of the wagon between the rails and the other on the north side of the track; that the car was being run at an excessive rate of speed; that those in charge of the car gave no signals; that there was nothing to obstruct the view of those in charge of the car when it arrived within two hundred feet of the team and wagon, and that they failed to have the car under control, permitting it to strike the team and wagon, causing the fatal injury to plaintiff's intestate.

Defendant contended that the car was being run at

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a moderate speed, that the proper signals were given and that Bell was guilty of negligence, in that while driving clear of the track outside of the rails on the north side, he suddenly turned his team straight across the track in front of defendant's car, so that the car could not be stopped in time to avoid the collision.

For plaintiff, Martin Bardsley testified that he was on Main street a short distance west of Guernsey street about twenty feet from the street car track, and first saw Bell approaching from the east three hundred feet away; that as Bell came on, he observed that the wheel of his wagon was caught on the inside of the tracks "skidding along," and the mules seemed to be trying to pull the wagon over to the north; that he turned away when the wagon was seventy or eighty feet from him, continuing in the same way as before; that he looked around on hearing a crack; that Bell and the mules were down on the street, or in front of the car; that the car was stopped after the collision about sixty feet west of Guernsey street. Charles Grater swore that he was talking to Bardsley on Main street, about forty feet from the center of Guernsey, and saw Bell sixty-five or seventy feet away; that Bell was driving in the center of the street with one wheel in the center of the track and one on the north side of it; that walking east about forty feet and passing Bell, he heard the crash, but did not see deceased after passing him until after the collision. Guy R. McCaslin was driving east in an automobile, and testified he passed deceased about two hundred feet from the place where the accident occurred, and the latter was then driving with one wheel between the tracks, but that he did not know where Bell drove after witness passed him. On the part of defendant, Jesse Drake testified that Bell drove with one wheel between the tracks until he reached the center of Guernsey street when he swung to the curb a little bit and drove parallel with and outside the tracks to a point about forty feet beyond the

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intersection of Guernsey street, and then turned south across the tracks, where he was struck. Five other witnesses also testified they saw deceased just before the accident; that he was between the curb and the rail on the north side and that just before the collision he turned south across the track. These witnesses for defendant were corroborated by undisputed testimony, showing that the mules and the left front wheel of the wagon were struck by the car; that deceased, after the accident, told his employer that he had an order to deliver at Mrs. Johnson's; that he went down Main street and attempted to cross over to her place to make the delivery, and the further fact that he did actually make the delivery of the goods after he was injured and before he was taken away for medical treatment.

WILLIAMSON, BURROUGHS & RYDER, for appellant.

CHARLES H. BURTON and TRAUTMANN, FLANNIGEN, BAXTER & HAMLIN, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. DEATH, § 42*—*when necessary to show exercise of ordinary care by deceased by preponderance of evidence.* In order to recover in an action for death due to the negligent act of defendant, plaintiff must prove by a preponderance of the evidence that at the time of sustaining the injuries resulting in death, and just prior to such time, deceased was in the exercise of ordinary care for his own safety.

2. APPEAL AND ERROR, § 1410*—*when determination of weight of evidence conclusive on review.* In actions involving the alleged negligence of street car companies in failing to give signals of the approach of cars, where the evidence as to the giving of such signals is conflicting, the jury and trial court who hear and see the witnesses are in a better position to determine the value of the testimony than a court of review.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. EVIDENCE, § 465*—*when positive evidence of greater value than negative evidence.* In actions involving the alleged negligence of street car companies in failing to give signals of the approach of cars, the positive evidence of those witnesses who testify that they heard the signals is generally of more evidential value than the negative testimony of those who did not hear such signals.

4. STREET RAILROADS, § 131*—*when evidence sufficient to establish giving of proper signals.* In an action to recover for the death of plaintiff's intestate as a result of a street car striking the wagon in which deceased was riding, throwing deceased out and causing injuries which resulted in his death, where the evidence was conflicting as to whether those in charge of the car gave proper signals of the approach of the car, weight of evidence held to show that such signals were given.

5. STREET RAILROADS, § 83*—*when motorman not bound to assume that driver of team will turn on track ahead of car.* The motorman of a street car is not bound to assume, in the absence of anything to warn him, that the driver of a vehicle proceeding along the streets in the same direction as the car will suddenly turn upon the tracks ahead of the car.

6. STREET RAILROADS, § 75*—*when evidence insufficient to sustain finding that car was operated at excessive speed.* In an action to recover for the death of plaintiff's intestate as a result of a street car striking the wagon in which deceased was riding, throwing him out and inflicting injuries causing his death, the fact that the car in question was stopped within ten feet of the place where the accident occurred, held to tend strongly to contradict plaintiff's claim that at the time of the accident defendant's car was being run at an excessive rate of speed.

7. STREET RAILROADS, § 131*—*when evidence insufficient to sustain verdict for death as result of collision of wagon with car.* In an action to recover for the death of plaintiff's intestate as a result of a street car striking the wagon in which deceased was riding, throwing him out and inflicting injuries resulting in his death, where the evidence tended to show that deceased suddenly turned from the street directly in front of the car, which was being run at a proper speed, a verdict for plaintiff held manifestly against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Arthur Cohen, Appellee, v. Cleveland, Cincinnati & St. Louis Railway Company, Appellant.

1. CARRIERS, § 503*—*when passenger not paying fare or showing ticket may be ejected.* In order to be entitled to be transported as a passenger on a train, the passenger must either pay his fare or deliver to the conductor his ticket showing his right to be so transported, and in case of refusal such passenger may be removed from the train.

2. CARRIERS, § 531*—*what injuries of ejected passenger carrier liable for.* Where a passenger is removed from a train for refusal to pay fare or to produce a ticket, the carrier is liable only for physical injuries sustained as the result of the use of unnecessary force and violence in removing such passenger therefrom.

3. CARRIERS, § 499*—*when passenger failing to produce proper ticket may recover for ejection.* Where a passenger has demanded and paid for a ticket to his destination but has failed to receive the proper ticket owing to a mistake of the carrier's agent, he may recover for being removed from the train in consequence of failing to produce the proper ticket or to pay the extra fare demanded, though no unnecessary force or violence was used in removing such passenger.

4. CARRIERS, § 531*—*what is measure of damages for ejection of passenger not producing proper ticket through fault of agent.* In an action to recover for wrongful removal from a train, where it appears that plaintiff demanded and paid for a ticket to his destination, which he failed to receive owing to the mistake of carrier's agent, and where plaintiff was removed for refusal to pay for the extra fare demanded, the elements of plaintiff's damages are the difference between the ticket paid for and the one delivered, any loss and delay caused by being removed from the train and reasonable damages for the indignity and humiliation suffered in being so removed.

5. CARRIERS, § 531*—*when damages for personal injuries to passenger sustained by being ejected recoverable.* Damages can be recovered from a carrier by a passenger for personal injuries sustained in being ejected from a train for refusal to pay fare only where the ejection is wanton and malicious, although such passenger produces a proper ticket which the carrier refuses to accept.

6. CARRIERS, § 527*—*when instruction as to nonliability for ejection of passenger not furnishing proper ticket properly refused.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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In an action to recover for being removed from a train for refusing to pay fare as demanded by the conductor, where it appeared that plaintiff demanded and paid for a proper ticket, which he failed to receive owing to a mistake of defendant's agent, and where the declaration claimed damages for the anxiety, humiliation and disorder sustained by plaintiff in being removed from the train, *held* that the court properly refused to give an instruction that the jury find defendant not guilty if it was found that plaintiff refused to pay fare as demanded, and that defendant's conductor used no unnecessary force in removing plaintiff, although plaintiff had demanded and paid for a proper ticket which he failed to receive owing to a mistake of defendant's ticket agent.

7. ACTION, § 38*—*when objection as to form of action unavailable*. The objection that an action should have been brought in contract and not in tort is unavailable after judgment entered where defendant did not demur or move in arrest of judgment.

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BEHNREUTER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

D. E. KEEFE, for appellant; L. J. HACKNEY, of counsel.

GEERS & GEERS, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellee, who was a horse buyer, living at Edwardsville, Illinois, having purchased some horses in Bunker Hill, started from home on August 29, 1914, with two boys, John Davis and Edgar Hicks, to get them. They went as far as Mitchell on a trolley line and at that place went into appellant's ticket office, where appellee asked for three tickets to Bunker Hill, handing the agent a two dollar bill. The agent gave him three tickets, charging him three regular fares of forty-six cents each and gave him back sixty-two cents, the proper change. The three boarded the train and appellee gave the tickets to the conductor. After leav-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ing Mitchell, the train passed through Bethalto, Moro and Dorsey. Beyond Moro the conductor asked them which one of them was supposed to get off at Bethalto and appellee told him none of them; that he purchased three tickets for Bunker Hill. The conductor then said that one of the tickets read to Bethalto and asked appellee to pay the additional fare from Bethalto to Bunker Hill, amounting to thirty-three cents, and told him that if he did not do so he would have to leave the train at Dorsey, the next stop. Appellee replied that he did not see why he should have to pay his fare twice, that he had paid for three tickets from Mitchell to Bunker Hill and that he ought to be permitted to ride. The conductor said that was not any of his lookout, that it might be a mistake of the ticket agent, that appellee would have to get off the train or pay his fare again. As the train was leaving Dorsey the conductor came to appellee again for his fare, which appellee refused to pay and he also declined to get off the train. The conductor then stopped the train, took appellee by the arm or shoulder and led him from the train. There was no resistance on the part of appellee and no violence used by the conductor. After leaving the train appellee was permitted by the conductor to get on again, pay his fare and ride to Bunker Hill. Subsequently, the mistake having been discovered, appellant's agent sent appellee an American express order for thirty-three cents. It is not claimed that appellee received any physical injury or suffered any pecuniary loss beyond the thirty-three cents which was returned to him by appellant, but he brought this suit to recover damages for the indignity and humiliation suffered by him in being removed from the train.

The verdict of the jury and judgment was in favor of appellee for the sum of one hundred dollars. There was no controversy of moment in the facts, and appellant insists they presented a case upon which appellee was not entitled to recover; also that there

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was error in the instructions. It is undoubtedly true, as a general rule, that a passenger desiring to pursue his journey upon a train must produce to the conductor his ticket, showing his right to be carried to his point of destination or pay his fare, and in case he refuses to do so he may be removed from the train; that in such case if the passenger has failed to purchase a ticket to his destination and refused to pay the fare, the company is only liable for any physical injury he may receive from force and violence used in excess of that necessary to put him off the train. But a different rule prevails under the decisions of this State where the passenger had demanded and paid for a ticket to the proper destination but, by mistake of the company's agent, had failed to receive it. If in such case the passenger is removed from the train, because he does not produce the proper ticket and refuses to pay the additional fare, the rule appears to be that he is entitled to recover, not only for the difference between the ticket purchased and the one delivered, but also for the delay and loss occasioned thereby and reasonable damages for the indignity and humiliation suffered by him in being expelled from the train.

In *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499, a passenger paid his fare to a certain station and the ticket agent inadvertently gave him a ticket to an intermediate station. He refused to pay the fare to his point of destination and the conductor, with his assistants, put him off the train. It is said in the course of the opinion: "The evidence tends to prove the mistake occurred at Mendota, through the inadvertence of the ticket agent in giving out the wrong ticket. If so, the conductor was right in demanding fare a second time. He was not bound to rely upon the statements of appellee that he had paid his fare to the station to which he desired to be carried. It was the duty of appellee to pay the fare demanded, and if the company refused to make suitable reparation for the indignity

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to which he had been exposed in being compelled to repay his fare, he could maintain an appropriate action." In *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, where a passenger had purchased a coupon ticket from Omaha to New York, issued by the Wabash, St. Louis & Pacific Railway Company on account of the Pennsylvania Railroad Company, which the latter refused to accept, and where on refusal to pay the regular fare demanded, the passenger was ejected from the train and brought suit against the Pennsylvania Railroad Company, it is said by the court: "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars, to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton." We hold to the belief that under the admitted facts in this case plaintiff was entitled to recover for the indignity and humiliation occasioned by his ejection from the train.

Appellant complains that the court refused an instruction offered it by it, which after setting forth the facts, in substance, told the jury that if they found the facts as stated then they were instructed, "that although the agent who sold Cohen a ticket may have charged him a price sufficient in amount to entitle him to be carried to Bunker Hill, as a passenger, still, you are instructed that the plaintiff had no right to ride upon said train without either producing a ticket or offering to pay his fare to the point of destination, and if he failed to do so, and the conductor for that reason ejected him from said train, using no more force than necessary, then you are instructed that the plaintiff is not entitled to recover in this case under the

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declaration in this cause, but you should by your verdict find the defendant not guilty." The declaration in the case claimed damages for the great anxiety, humiliation, mental anguish and disorder suffered by appellee, and from what is above said and in our view of the law as above expressed, was sufficient to show the right of recovery which was established by the facts. The instruction was therefore erroneous and was properly refused.

Appellant complains that even though appellee was entitled to recover, his action should have been for breach of contract and not for tort. We do not consider this claim of appellant well founded, but even if it were otherwise, yet as appellant did not demur to the declaration nor move in arrest of judgment he cannot, after judgment entered, take advantage of the points relied on. Under the law and the evidence in this case, appellee appears to have been entitled to the judgment which he obtained and the same will therefore be affirmed.

Judgment affirmed.

Hayes Pump & Planter Co. v. Vickers, 197 Ill. App. 94.

Hayes Pump & Planter Company, Appellee, v. T. S. Vickers, Appellant.

1. APPEAL AND ERROR, § 966*—*what errors considered on appeal.* A court of review will consider only errors based on the record filed in the reviewing court.

2. APPEAL AND ERROR, § 711*—*what matters not part of record on review.* Matters not included in the bill of exceptions which is signed and sealed by the trial judge are not part of the record on review.

3. APPEAL AND ERROR, § 800*—*when objection that verdict against weight of evidence not considered.* The objection that a verdict is against the manifest weight of the evidence will not be considered by a court of review where the bill of exceptions does not include the motion for a new trial and the ruling thereon, such motion and ruling being necessary to raise such objection on review.

Appeal from the Circuit Court of Pope county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

CHARLES DUFFEE, for appellant.

JOHN W. BROWNING, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

This was an action in assumpsit brought by appellee, Hayes Pump & Planter Company, against T. S. Vickers, to recover the purchase price of certain agricultural implements sold by appellee to T. S. Vickers, a retail dealer in agricultural implements. The amount claimed to be owing is \$269.24.

The consolidated common count only was filed. Appellant filed a plea of the general issue, with notice of special matter of defense. A trial was had, finding for the appellee, and judgment was rendered for appellee in the sum of \$193.24. From that judgment this appeal was taken.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellant contends, first, that the verdict of the jury was not sufficiently certain to warrant the court in entering judgment thereon; second, that said purported verdict and judgment is contrary to the manifest weight of the evidence.

It is a fundamental principle of law in this State that in courts of review only those errors can be considered which are based upon the record filed in the reviewing court. This principle is so well recognized that it needs no citations of authority to support it. The record in this case as filed wholly fails to bring before this court the verdict of the jury, the instructions of the court, the motion for a new trial, the ruling of the trial court on said motion. The bill of exceptions as signed by the trial judge includes the evidence taken on the hearing, but does not include the instructions, the verdict of the jury, the motion for a new trial and the ruling of the trial court thereon. Following the certificate of the trial judge are certain purported instructions, purported verdict of the jury and certain amplified minutes of the clerk showing hearing of the cause, the motion for new trial and the ruling on the same, a motion in arrest of judgment and ruling on the same. However, it has frequently been held by the courts of this State that in order to make these matters of record it is necessary that they be included in the bill of exceptions, and be signed and sealed by the trial judge.

The purported verdict complained of and which as it appears from the minutes of the clerk is as follows: "We the jury find the issue for the plaintiff and assess the plaintiff's damages at 193.24," and it is contended by appellant that this verdict is insufficient, because the dollar sign is not placed in front of the figures. The trial court treated said verdict as a verdict for \$193.24, and entered judgment accordingly.

The verdict is not properly before us by reason of the fact that it was not included in the bill of exceptions, and we therefore express no opinion as to the

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sufficiency of the same. *East St. Louis Elec. St. R. Co. v. Cauley*, 148 Ill. 490; *James v. Dexter*, 113 Ill. 654; *Graham v. People*, 115 Ill. 566.

Appellant's contention that the verdict is against the manifest weight of the evidence cannot be considered by this court for the reason that the bill of exceptions, as above set forth, does not include the motion for a new trial and the ruling of the court thereon, which are necessary to raising that question in this court.

It therefore follows from what we have said, that the appellant not having a record of the rulings of the court complained of in the trial of said cause, that the judgment of the trial court must be affirmed.

Judgment affirmed.

Samuel Knight, George Moser and James LaMar, Commissioners, et al., Appellants, v. Partridge Drainage District No. One et al., Appellees.

1. ROADS AND BRIDGES, § 154*—*when corporate authorities of road crossing drainage ditch required to rebuild bridge.* Hurd's Rev. St., ch. 42, sec. 55 (J. & A. ¶ 4436), requiring that the corporate authorities of a road or railroad crossing a ditch or drain constructed by drainage commissioners along a natural depression, channel or water course in a levee district to construct bridges, culverts and other works crossing such ditch or drain at their own expense, held applicable to the reconstruction of bridges on a public highway, which bridges were removed by drainage commissioners in the construction of a ditch along a natural water course in a levee district.

2. ROADS AND BRIDGES, § 154*—*constitutionality of statute relating to construction of bridges over drains and ditches in levee district.* Hurd's Rev. St., ch. 42, sec. 55 (J. & A. ¶ 4436), relating to the construction, repair and replacement of bridges, culverts and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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other works across ditches and drains along the line of a natural depression, channel or water course in a levee district is constitutional.

3. **ROADS AND BRIDGES, § 154***—*what distinction made by statutes relating to bridges over drains and ditches as to liability for construction of bridges.* The statute relating to bridges over ditches and drains constructed by drainage districts make a distinction between bridges in farm districts and in levee districts, the drainage district being required by Hurd's Rev. St., ch. 42, secs. 40 and 40½ (J. & A. ¶¶ 4516, 4517) to construct such bridges in farm districts whether the route of the ditch or drain be natural or artificial, while section 55 (J. & A. ¶ 4436) of the same chapter requires that bridges crossing such a ditch or drain constructed along the line of a natural depression, channel or water course in a levee district be constructed at the expense of the corporate authorities of the road or railroad crossing such ditch or drain.

4. **ROADS AND BRIDGES, § 154***—*how statute requiring townships to build bridges over artificial drainage ditches unconstitutional.* That portion of Hurd's Rev. St., ch. 42, sec. 40½ (J. & A. ¶ 4517), allowing a drainage district to sue townships for the cost of bridges constructed by such district over ditches or drains constructed by them in farm districts as required by section 40 of the same chapter (J. & A. ¶ 4516) is unconstitutional in so far as such statute attempts to impose on townships the duty of building bridges over artificial drainage ditches.

5. **MANDAMUS, § 65***—*when demurrer to petition to compel commissioners of drainage district to replace bridge over drainage ditch properly sustained.* In a petition for mandamus to compel the commissioners of a drainage district to replace bridges on a highway, which bridge was removed by respondents in constructing a drainage ditch along the line of a natural water course in a levee district, where petitioners were highway commissioners of the township in which the bridges were removed, a demurrer to the petition held properly sustained, and the petition properly dismissed.

Appeal from the Circuit Court of White county; the Hon. E. E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

JAMES M. ENDICOTT, for appellants; JOE A. PEARCE, of counsel.

CONGER, PEARCE & CONGER, for appellees.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE BOGGS delivered the opinion of the court.

This was an action brought by the Commissioners of Highways of the Town of Phillips, White County, Illinois, and the Town of Phillips, County of White, State of Illinois, against Partridge Drainage District No. One, White County, Illinois, and Solomon R. Hall, Henry Rodenberg and Sherman McMurtry, Commissioners of Partridge Drainage District, asking for a writ of mandamus to compel the said commissioners of the drainage district to build and maintain certain bridges on the public highway across the drainage ditch constructed by them, these bridges having been torn out by said commissioners in the construction of said ditch in and along a certain natural water course known as "Brown Branch."

Appellants take the position by their petition that a levee drainage district should be compelled to build the bridges over its drains crossing public highways in natural water courses, while appellees by their demurrer deny this proposition, and this is the sole question raised here on the record.

The third proviso to section 55 of chapter 42 of Hurd's Revised Statutes known as the Levee Act (J. & A. ¶ 4436) is as follows: "The sum assessed against either of said corporations (railroad or township) shall not include the expenses of constructing, erecting or repairing any bridge, embankment or grade, culvert or other work of the roads of such corporations, crossing any ditch or drain, constructed on the line of any natural depression, channel or water course; but the corporate authorities of such road or railroad are hereby required, at their own expense, to construct such bridge, culvert or other work, or to replace any bridge or culvert temporarily removed by the commissioners in doing the work of such district. Full power and authority is hereby given the drainage commissioners to remove such bridges or culverts for the purposes aforesaid, if they, in their judgment find it necessary."

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This provision, if constitutional, it would seem would be applicable to this case, and its effect, if given its ordinary meaning, would be against the contention of appellants.

Appellants' petition shows that the drain in question crosses the highway on the line of a natural water course, and we can see no valid reason why the provisions of section 55 should not operate.

The provisions of section 55 were under consideration in the case of *Heffner v. Cass and Morgan Counties*, 193 Ill., page 439, and in that case it was held that said act was constitutional and that it applied to public corporations having control of public highways.

In the *Heffner* case, *supra*, the provisions of said section 55, and especially the last provision thereof, being the one above referred to, were fully discussed by the Supreme Court, and the effect to be given to said section was pretty clearly laid down.

The distinction between bridges in farm and levee districts must be carefully maintained. In farm districts, sections 40 and 40½ (J. & A. ¶¶ 4516, 4517) require the drainage district to build the bridges in all cases, whether the route be natural or artificial, and then allow such drainage district to sue the townships for the costs of such bridges and make necessary a levy of taxes to pay the same; while the Levee Act provides that the commissioners may remove bridges across the drains of the district where it crosses a highway on the line of any natural depression, channel or water course, and provides that the corporate authorities of such road shall rebuild the bridge made necessary thereby.

The Supreme Court has held this method in the Farm Drainage Act unconstitutional and has further held that the Legislature cannot constitutionally place the duty of building bridges over artificial drainage ditches on the township.

When the authorities cited by counsel for appellants are carefully examined, they will be seen to be not in

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conflict with the proviso of section 55 of the Levee Act.

Counsel for appellants cite and rely on the cases of *Highway Commissioners v. Drainage Commissioners*, 246 Ill., page 388, and *People v. Fenton & T. R. Co.*, 252 Ill., page 372. In the case of *Highway Commissioners v. Drainage Commissioners*, *supra*, it was held that the duty rested on the drainage commissioners to build the bridges on highways across their drainage ditches irrespective of whether it was an artificial or a natural ditch. This case arose under the Farm Drainage Act and construes sections 40, 40½ and 41 (J. & A. ¶¶ 4516-4518) thereof, which requires the drainage district to build the bridges and then sue the highway commissioners for the same, and of course under such circumstances both in justice and under the very terms of the Farm Drainage Statute the duty rested on the drainage commissioners to build the bridges in the first place. It is further to be distinguished from the case at bar in that it is not a case of original construction but is a case where the district had theretofore been established, and the highway commissioners had built the bridge and afterwards the drainage district sought to enlarge the bridge, and this distinction is made clear on page 393 of the opinion.

In the case of *People v. Fenton & T. R. Co.*, *supra*, while some language is used by the Supreme Court which may seem to support the contention of appellants, still a careful reading of this case will disclose that the drainage ditch in question was not in the natural course of the stream, but was a new ditch, and the court in that case recognized the distinction between a natural and artificial ditch as applied to the duty of drainage commissioners in reference to the bridges over the same.

Appellants also contend that because the enlarging of the natural ditch by the drainage district across the highways in question would involve the necessity of building larger bridges, that therefore the ditch should

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be held to be an artificial one, and that the drainage district would therefore be liable to construct the bridge. This, however, is not a new question but was directly involved in the case of *Heffner v. Cass and Morgan Counties, supra*, and the holding of the Supreme Court in that case after carefully considering this question was against the contention of appellants.

The provision of section 55 of the Levee Act as construed by our Supreme Court, we think, is squarely against the contention of appellants, and we are, therefore, of the opinion that the Circuit Court was right in sustaining the demurrer to appellants' petition for a writ of mandamus and in dismissing said petition, and the judgment of said court is hereby affirmed.

Affirmed.

**Miles F. Bixler, trading as Miles F. Bixler Company,
Plaintiff in error, v. T. A. Henson, Defendant in
Error.**

(Not to be reported in full.)

Error to the County Court of Franklin county; the Hon. THOMAS J. LAYMAN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Suit by Miles F. Bixler, trading as Miles F. Bixler Company, plaintiff, against T. A. Henson, defendant, to recover the purchase price of goods sold. From a judgment for defendant, plaintiff brings error.

The contract of sale was evidenced by a written order signed by the defendant containing a provision, which was brought to his attention, that the seller's agent had no authority to change or add to the writ-

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ten terms of the sale except by writing on the original order which was subject to the acceptance of the seller. At the defendant's request the plaintiff's agent verbally guaranteed delivery by a certain date and assured the defendant that such agreement would be as binding on the seller as though incorporated in the written order. The goods not having been delivered at the time agreed upon, the defendant refused payment.

THOMAS I. GALLOWAY, for plaintiff in error.

R. E. SMITH and NEALY I. GLENN, for defendant in error.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 108*—*when parol agreement by agent varying contract not binding on principal.* Where a written order for goods signed by the purchaser provides that no alteration or extension of the terms of sale therein set out shall be binding on the seller unless incorporated in writing in the order and accepted by him, a parol agreement by the seller's agent guarantying delivery by a certain date is not binding on the seller.

2. PRINCIPAL AND AGENT, § 169*—*when agent liable on unauthorized contracts.* In so far as agreements and guaranties of an agent are beyond the implied scope of his authority, they are his personal obligations and not those of his principal.

3. FRAUD, § 19*—*when verbal promise by agent varying contract does not constitute fraud.* An assurance by the agent of the seller to the purchaser that an oral agreement varying the terms of sale contained in a written order for goods will be binding on the seller, notwithstanding a provision in such order that no alteration or extension of the terms thereof will be binding unless incorporated therein in writing and accepted by the seller, does not constitute such fraud as will invalidate the contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mary Noonan, Administratrix, Appellee, v. Philip A. Maus, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Monroe county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Mary Noonan, administratrix of the estate of Dennis Noonan, deceased, plaintiff, against Philip A. Maus, defendant, to recover damages for the death of the plaintiff's intestate caused by the defendant's negligent operation of his automobile. From a judgment of \$2,500 for the plaintiff, defendant appeals.

STONEWALL J. WALTON and OLIVER SENTI, for appellant.

A. C. BOLLINGER and D. J. SULLIVAN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 182*—*when evidence of habits of injured person admissible to prove due care.* While the general rule is that where there are eyewitnesses to an accident, testimony as to the habits of the person injured is not admissible for the purpose of proving due care on his part, yet where eyewitnesses are lacking to some part of an accident, it is proper to admit evidence of the careful habits of the party injured for his own safety and of his skill and experience in driving.

2. NEGLIGENCE, § 208*—*when instruction on manner of proving due care and caution for one's safety proper.* On the issue of contributory negligence, it is proper to instruct the jury that due care and caution for one's own safety are not necessary to be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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proven by direct and positive evidence, but may be proven also by facts and circumstances appearing on the trial.

3. AUTOMOBILES AND GARAGES, § 3*—*when instruction as to duty of driver of automobile to give warning proper*. It is proper to instruct the jury that it is the duty of a driver of an automobile to give reasonable warning of his approach when meeting teams on the public highway though the only evidence of lack of warning is negative.

4. EVIDENCE, § 465*—*what is comparative weight of positive and negative testimony*. While negative testimony is not of as much weight as positive testimony, it is proper to be considered by the jury.

5. INSTRUCTIONS, § 96*—*when instruction on credibility of witnesses erroneous*. An instruction that: "The jury are instructed that they are the sole judges of the credibility of the witnesses, and if they find and believe from the evidence that any witness had testified falsely as to any material fact, they are at liberty to disregard all the evidence of such witness," is properly refused where it fails to add, "except in so far as their testimony may be corroborated by other credible witnesses, or by the facts and circumstances appearing on the trial," and also omits the element of "wilfulness."

6. TRIAL, § 99*—*when objection should be made to incompetent testimony*. Specific objection should be made to testimony for its incompetency at the time it is offered rather than to wait until it is all in and then move to exclude it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George S. Richmond, Appellant, v. Mary Conner, Appellee.**(Not to be reported in full.)**

Appeal from the Circuit Court of Jasper county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by George S. Richmond, plaintiff, against Mary Conner, defendant, on a promissory note. Judgment by confession during vacation after the October term, 1913. On the defendant's motion at the October term, 1914, the judgment was opened and leave to plead granted. After joinder a trial before the judge without a jury resulted in a judgment for the defendant for costs and in bar. Plaintiff appeals.

EMERY ANDREWS and RAYMOND G. REAL, for appellant.

FITHIAN & KASSERMAN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENTS, § 78*—*when judgment by confession will be opened after term.* The courts of law exercise equitable control over judgments by confession and may open them after the term at which they were rendered has closed and another term has intervened before motion.

2. APPEAL AND ERROR, § 1414*—*when findings of trial court not disturbed on appeal.* Where the evidence is conflicting, the findings of the trial judge, a jury having been waived, will not be disturbed where no errors of law have intervened unless such findings are against the manifest weight of the evidence, even though the Appellate Court cannot say that its finding on the evidence as disclosed by the record would have been the same as that of the trial court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Elijah H. Marteeny et al., Appellants, v. J. Warner Louth, Commissioner, et al., Appellees.

1. TOWNSHIP ORGANIZATION, § 39*—*when purchasers of bonds necessary parties to action to have bonds declared invalid.* In a taxpayers' suit against the commissioner of highways seeking, in connection with other relief, to have bonds—issued and sold in accordance with the outcome of an election—declared invalid, such question of the validity of the bonds cannot be considered where the purchasers of them have not been made parties to the action.

2. INJUNCTION, § 99*—*when work under contract by highway commissioner for construction of roads perpetually enjoined.* Where a commissioner of highways has let a contract for the construction of roads in violation of the statute, a court of equity will at the suit of a taxpayer declare such contract void and perpetually enjoin work thereunder.

3. TOWNSHIP ORGANIZATION, § 33*—*when township liable for work done under void contract.* Where, in a taxpayers' suit against a commissioner of highways, a temporary injunction is filed, of which the commissioner has notice, restraining him from paying out moneys and doing construction work under a certain void contract but he nevertheless proceeds with the work until the filing of the injunction bond and service of the writ upon him, payment is properly ordered for the work so done, it appearing that the town has the benefit of it, and that in doing the work the highway commissioner was not actuated by any fraudulent purpose, but that he believed he was acting within the law and that he was attempting to procure the work to be done as economically as possible.

4. EQUITY, § 1*—*when discretionary power of officers not disturbed.* A court of chancery will not take upon itself the control of the discretionary powers of a municipal or quasi municipal officer.

5. TOWNSHIP ORGANIZATION, § 28*—*when highway commissioner has no discretion as to use of materials for highway improvements.* Where, in accordance with the provisions of section 112, ch. 121, Hurd's Rev. St., the petitioners by their petition and the voters by their votes designate specifically the amount of funds to be raised for highway improvements and the specific highways to be improved out of such fund, it does not rest in the discretion of the highway commissioner as to what materials he may employ within the terms of the statute, but he must employ such material as will,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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with the funds available, enable him to substantially complete the entire portions of the highways designated in the petition.

Appeal from the Circuit Court of Jefferson county; the Hon. E. E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

ROBERT M. FARTHING, for appellants.

JOEL F. WATSON, GEORGE L. ORE and CONRAD SCHUL, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

On the 21st day of March, 1914, there was filed with the town clerk of the Town of Mt. Vernon, Jefferson county, Illinois, a petition signed by the commissioners of highways of said town in their official capacity, and also by 172 freeholders of said town, requesting that the town clerk, when giving notice of time and place of holding the annual town meeting for the year 1914, also give notice "that a vote would be taken on the proposition for borrowing \$40,000 to construct gravel, rock, macadam, concrete or other hard roads, in said town, to the extent, in the places and for the distances, as follows:

"Shawneetown road, from the city limits of the City of Mt. Vernon to the south boundary line of the town, a distance of one-quarter of a mile, more or less;

"Tenth street road, from the city limits of the City of Mt. Vernon to the south boundary line of the town, a distance of one-quarter of a mile, more or less;

"Brownsville road, from the city limits of the City of Mt. Vernon to the south boundary line of the town, a distance of one-quarter of a mile, more or less;

"Ashley road, from the city limits of the City of Mt. Vernon to the west boundary line of the town, a distance of one-quarter of a mile, more or less;

"Richview road, from the city limits of the City of

Mt. Vernon to the west boundary line of the town, a distance of one-quarter of a mile, more or less;

“Centralia road, from the city limits of the City of Mt. Vernon to the west boundary line of the town, a distance of one mile, more or less;

“Perkins avenue road, from the city limits of the city of Mt. Vernon eastward, a distance of two miles, more or less;

“Fairfield road, from the city limits of the City of Mt. Vernon eastward for a distance of two miles, more or less;

“Toll Mill road, from the city limits of the City of Mt. Vernon northward for a distance of two miles, more or less;

“Salem road, from the city limits of the said City of Mt. Vernon northward for a distance of two miles, more or less.”

The aggregate mileage mentioned in the petition is approximately ten miles.

The proposition carried, and the bonds were subsequently issued, sold, and the proceeds came into the hands of the appellee, E. Delbert Wilkerson, supervisor and *ex officio* treasurer of the road and bridge fund of said town. The town having previously adopted the single highway commissioner system, appellee J. Warner Louth was elected highway commissioner at said annual town election, and appellee Tony C. Pitchford was and is the county superintendent of highways of Jefferson county.

The highway commissioner with the approval of the county superintendent of highways advertised the letting of the contract for the construction of concrete roads ten feet in width, with a four foot macadam shoulder on each side.

The contract was let to G. Kirk Carver, appellee, at \$25 over and above the cost price of the road, and \$3 per diem for his services while employed in such construction. The evidence tends to show that Carver

was a "dummy contractor" and that the whole plan was an effort to go around the provisions of the statute requiring the contract for the construction of the work to be let to the lowest bidder; and to permit the highway commissioner to construct the roads by purchasing material and employing the labor himself. The evidence further tends to show that the cost of the concrete roads, such as contemplated by the contractor, Carver, would be from \$8,000 to \$11,000 per mile, and that macadam or gravel roads can be built at a cost from \$3,500 to \$4,500 per mile.

On the 25th of August, 1914, appellants filed a bill setting up the above facts and averring that the bond issue was illegal and praying for an injunction against the further construction of the concrete roads, and also praying that in the event that the court should find the bond issue legal that a mandatory injunction be issued compelling the highway commissioner to let the contract and construct said hard roads to the extent, in the places and for the distances described in said petition, of rock or macadam or other suitable material, of such width and thickness as may be built at a cost not to exceed \$4,000 per mile. A temporary injunction was ordered issued on September 5, 1914, upon filing bond, which bond was not filed until the 12th of September. Prior to the filing of the bond and the issuing of the injunction writ, 1,320 lineal feet of road had been built, except the macadam shoulders, and there had been paid out on said work the sum of \$3,855.18.

The cause came on for hearing on the 12th day of October, 1914, at a regular term of court upon the bill, motion to dissolve the injunction, answers, replications and the evidence, and the trial court found on the hearing that the bonds were legally issued; that the contract let to Carver by the highway commissioner was void for the reason that the statute as to public notice, etc., had not been followed, and "that the said J. Warner Louth, as such commissioner, had a legal right to

construct said highways according to his discretion out of any of the materials mentioned in the said petition." On this finding the court entered an order decreeing that appellee J. Warner Louth, as such highway commissioner, with the approval of the county superintendent of highways, proceed to let the contract publicly, as provided by statute, to build the said hard roads to the extent that the said sum of \$40,000 will build out of such materials as said commissioner of highways, with the approval of said county superintendent of highways shall select, "namely, out of gravel, rock, macadam or concrete," being the materials mentioned in said petition.

The court further ordered that the work already constructed should be paid for out of the proceeds derived from the sale of said bonds, except as to certain work and teams furnished by said Louth to said Carver; that the amount that would be owing to Louth should not be allowed, and that any funds paid to Louth should be repaid to the treasurer. The temporary injunction was made perpetual in so far as it enjoined the highway commissioner and said contractor from proceeding under said contract which the court held to be illegal.

The examination of the errors raises the following questions: First, was the election and the bonds issued in pursuance thereof valid? Second, did the court err in finding the contract made by the highway commissioner with the man Carver void, and, if void, did the court err in ordering the payment for the work done and the materials furnished on the road, so far as constructed, paid out of the proceeds of said bond issue? Third, did the trial court err in refusing to enjoin the commissioner of highways and the superintendent of highways from adopting specifications for the construction of said road, when said specifications contemplated materials and work, the cost of which would exhaust the funds voted by the citizens and tax-

payers before more than half of said work specified in said petition had been completed?

The election was held under provisions of section 112, chapter 121 of Hurd's Revised Statutes, which act provides for the holding of said election upon petition of the commissioner of highways in their official capacity and of 100 freeholders in any town or district, and so far as the record shows in this case the election was regular. The people voted for the making of the loan and the bonds were legally issued, and, we think, are valid and binding. Even if not valid, the question cannot be raised here for the reason that the bonds have been sold and the bondholders have not been made parties to this proceeding. The court would not undertake to declare the bonds invalid without giving the bondholders an opportunity to be heard.

On the second proposition we do not think it is seriously contended on the part of appellee that the commissioner of highways even seriously attempted to follow the provisions of the statute in the letting of the contract. The most that was contended by appellee is that the commissioner was attempting to procure the construction of the work in the most economical way, but not that he had complied with the provisions of the statute as to the letting of the contract, and, we think the court ruled correctly when it found the contract made between Louth, the commissioner of highways, and Carver, the contractor, was illegal, and the court was also correct in perpetually enjoining the construction of said work under said contract.

A more serious question arises on the proposition as to whether or not payment for the work done and materials furnished under this void contract should be paid for out of the funds derived from the sale of the bonds, not including work or materials furnished by Louth, the highway commissioner. It is urged as a special reason by the appellants why said payment should not be made, that a large part

of this work was done after the trial court had entered an order for temporary injunction and before the bond was filed. In other words, that the highway commissioner had notice of the order for said injunction, and that notwithstanding this notice, he proceeded with the work up until the bond was filed and he was served with a writ. We are not prepared, however, to say that the trial court was not warranted in ordering this work and materials paid for out of said funds, inasmuch as the town has the benefits of said work, and there is nothing to show that in doing this work the highway commissioner was actuated by any fraudulent purpose, but that he believed he was acting within the law and that he was attempting to procure the work to be done as economically as possible. We, therefore, are of the opinion that that part of the decree should not be disturbed.

The bill for injunction in this case prayed not only that the commissioner of highways and the superintendent of highways be enjoined from constructing concrete roads, but that a mandatory injunction be issued, directing that "the commissioner of highways and the county superintendent of highways be commanded to proceed to construct the said hard roads to the extent, in the places and for the distances described in said petition, of rock or macadam, or other suitable material, of such width and thickness as may be built at a cost of not to exceed \$4,000 per mile."

If the prayer of this petition contemplates that a court of chancery shall take upon itself the control of the discretionary powers of a municipal or *quasi* municipal officer, the answer is, that the law is too well settled that this cannot be done, to admit of serious controversy. *Brush v. City of Carbondale*, 78 Ill. 74; *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *Canal Commissioners v. Village of East Peoria*, 179 Ill. 214; *Town of Lemont v. Singer & Talcott Stone Co.*, 98 Ill. 99; *High on Injunctions*, vol. 2, sec. 1311.

As we view this case, this is not the question that is really presented to the court to be determined, but the real question is, did the legal voters who voted at the election held in pursuance of the petition filed with the town clerk of the Town of Mt. Vernon, in which a specific amount of \$40,000 was voted to be borrowed to construct gravel, rock, macadam, concrete or other hard roads, in said town to the extent, in the places and for the distances specified, limit the discretion of the highway commissioner and the county superintendent of highways in the amount that they should expend in the construction of said work? Did the legal voters by their vote limit the commissioner of highways and the county superintendent to the expenditure of so much per mile for the construction of the work petitioned for, that the amount voted would substantially complete the entire work specified in the petition? If they did, then a court of equity would have the right to see that limitation made by the legal voters should be enforced. No serious question could be raised in this case as to the discretionary powers of the commissioner of highways in the construction of these roads and as to the materials to be used, were it not for the fact that the petition specifically designated each particular road to be improved and the length of the improvement. The evidence in the record is that the concrete roads, with macadam shoulders, being constructed by the commissioner of highways, will cost from \$8,000 to \$11,000 per mile, so that not to exceed five miles of the road specified in the petition can be completed out of the funds voted. We understand the attitude of the commissioner, as set forth in the evidence, to be that it is a matter entirely in his discretion as to the materials he shall use and also as to the roads which he shall improve, so that if left unrestrained, the probability is that only about one-half of the roads specified would be improved and no work whatever would be done on the others. If that situation is to follow, it would

work a fraud on the petitioners and voters who voted these improvements, and who are taxed to pay for the same, and a large proportion of them would receive practically no benefit from the expenditure of said money. We do not believe that this arbitrary power claimed by the commissioner of highways in the case at bar was ever contemplated by the statute.

In the case of *People v. Kankakee & S. R. Co.*, 248 Ill. at page 117, the court says: "The statute authorizes a vote for or against levying a tax for the purpose of construction and maintaining gravel, rock, macadam or other hard roads. The petition was for a vote upon the proposition to levy a tax to be used in constructing macadamized roads. The notice and election were for levying a tax for the purpose of constructing and maintaining gravel, rock, macadam or other roads, and the levy is for the purpose of constructing and maintaining gravel, rock, macadam or other hard roads. The statute authorizes a vote upon the question of levying a tax for hard roads upon a petition. The petitioners have the right to determine the kind of road they want voted upon,—whether gravel, rock, macadam or other hard road. They may, if they see fit, petition for a vote upon levying a tax for gravel, rock, macadam or other hard road, leaving the character of the road to be determined by the highway commissioners, but if the petition is for a vote upon a particular kind of hard road the vote must be had upon that proposition and cannot be extended to other kinds of road."

In the case of *People v. Cleveland C., C. & St. L. Ry. Co.*, 266 Ill. at page 101, the court says: "Where the petition is for a vote upon a particular kind of hard road the vote must be had upon that proposition and cannot be extended to other kinds of road. The notice and ballot should follow and agree with the petition." Citing and approving, *People v. Kankakee and S. R. Co.*, 248 Ill. 114, and *People v. Cincinnati, I. and W. Ry. Co.*, 261 Ill. 582.

It will be seen, therefore, that the court in these cases recognized that while, if the petition does not specify the character of the material that shall be used in the construction of hard road, the kind of materials to be used shall be left to the commissioner of highways, but if the petition specifies the character of materials to be used it is valid and binding upon the commissioners, and their discretion in that regard is limited.

By analogy, therefore, we hold that the petitioners in this case, by their petition and the voters by their vote, limited the discretion of the commissioner of highways and the county superintendent of highways in the amounts that they should expend in the construction of the highways to such an amount as would allow them to substantially complete the various work specified on the respective roads mentioned in the petition.

We believe that a consideration of section 122 of said Act will throw some light on the construction which should be given to section 112 touching this matter.

Section 122 provides: "The commissioners and the county superintendent of highways may, in their discretion, cause the road to be constructed wholly of earth, and by a thorough system of tile and other drainage, when gravel, stone and other suitable hard materials cannot be obtained at a cost within the means in the hands of the commissioners." It will be observed that the Legislature had in mind in the enactment of section 122 that the commissioners of highways should take into consideration the work they had to do and the funds at their command to be used for that purpose. And, if necessary, when gravel, rock and other suitable hard materials cannot be obtained at a cost within the means in the hands of the commissioners that then they may cause the road to be constructed wholly of earth. We hold, therefore, that the commissioner of highways in the case at bar has so much work to be constructed, and

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has certain specified funds to pay for said work, and he must, in exercising his discretionary powers, be limited as to the character of the materials to be used to a certain extent by his limitation of funds. This, we think, is in keeping with the spirit of the statute under which he is acting.

The evidence is that macadam or gravel roads can be built in that community at a cost of from \$3,500 to \$4,500 per mile, and that said macadam or gravel roads constituted a suitable and available material, and this, we think, would also follow from the language of the statute which specifies rock or macadam roads.

Our conclusion, therefore, is that the decree should be affirmed in so far as it holds the bonds in question to be legal and valid, and in so far as it sets aside the contract entered into by the commissioner of highways and the contractor, Carver, and in so far as it perpetually enjoins the same, and should be affirmed in its judgment for costs against appellees, and should be affirmed as to the payment for the work and materials already used in the construction of said work already done, and should be reversed in so far as it holds that the commissioner of highways has unlimited discretion as to the materials which he may use in the construction of the work specified in the petition. A decree should be entered enjoining Louth, commissioner of highways, and Tony C. Pitchford, county superintendent of highways, from specifying materials and work and the letting of any contract, the cost of which, for substantially the entire work petitioned for, cannot be paid out of the funds derived from the bonds in question, and except for that limitation placed on the commissioner of highways and the county superintendent of highways, by said petition and by said election, their discretion to be limited only by the statute.

Reversed and remanded.

Clarence Penrod by Clara Penrod, Appellee, v. East St. Louis Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by Clarence Penrod, a minor, by Clara Penrod, his next friend, plaintiff, against the East St. Louis Railway Company, defendant, for injury to a hand, necessitating the amputation of the fingers and part of the thumb, resulting from being knocked down and run over by the defendant's car at a street crossing. From a judgment for plaintiff for \$4,000, defendant appeals.

During the winter season the defendant operated its cars eastward on the north side of the bridge and westward on the south side, the superstructure of the bridge consisting in part of lattice work standing between the north and south tracks. The testimony for the plaintiff tended to show that the defendant's car was approaching the crossing from the west on the north side of the bridge at a high rate of speed, without sounding a gong or giving any other signal; that the plaintiff, before approaching the crossing from the south side, stopped and listened for the ringing of the gong of the defendant's street cars, and not knowing of the custom to operate eastbound cars on the north track, looked toward the east, and seeing none stepped upon the track, was knocked down and injured. Further, the admitted facts were that the tracks of the defendant's line ran within two feet of the superstructure of the bridge and that the lattice work thereof practically shut off the view of persons approaching the crossing from the south side of the bridge.

Penrod v. East St. Louis Ry. Co., 197 Ill. App. 117.

BARTHEL, FARMER & KLINGEL, for appellant.

KEEFE & SULLIVAN, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 157*—*when plaintiff must prove use of ordinary care.* In an action for damages for personal injury resulting from the defendant's negligence, the plaintiff must prove that at the time of the injury he was in the exercise of due care for his own safety and that he was not guilty of negligence contributory to the injury.

2. STREET RAILROADS, § 135*—*when contributory negligence of pedestrian in stepping on track after emerging from under bridge question for jury.* A pedestrian passing along a street crossing extending under the superstructure of a bridge, within two feet of which street car tracks are laid, who before emerging therefrom stops and after listening for the car signals and hearing none, looks in the direction from which cars would ordinarily be approaching, steps upon the track, and is knocked down and injured by a car coming from the opposite direction, may not properly be found by the jury to have been guilty of contributory negligence.

3. STREET RAILROADS, § 131*—*when evidence sufficient to establish negligence in operation.* A jury is warranted in finding a motor-man guilty of negligence who operates a street car at a high rate of speed in a direction opposite to that in which such cars would ordinarily be run in approaching, without giving proper signals, a street crossing, the view from which is obstructed.

4. NEGLIGENCE, § 198*—*when question of due care or contributory negligence for court.* It is only where the important facts touching on the question of contributory negligence are undisputed that the court has the right to declare, as a matter of law, that a party was not in the exercise of due care or that he was guilty of contributory negligence.

5. NEGLIGENCE, § 198*—*when question of due care and contributory negligence for jury.* Where important facts are in dispute, the questions of due care and contributory negligence is pre-eminently one of fact for the jury.

6. STREET RAILROADS, § 94*—*when person may assume that motor-man will give signal and have car under control.* On the question of contributory negligence in a personal injury action, the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff, about to pass over a street crossing, is justified in assuming that the motorman of the defendant's street car will obey the law by sounding his gong on approaching the crossing and will have his car under proper control.

7. STREET RAILROADS, § 64*—*what degree of care required in operation of cars at street crossings.* It is incumbent upon persons operating street cars to exercise a greater degree of care and watchfulness at street crossings or intersections than at other places along the route.

8. STREET RAILROADS, § 133*—*when question of negligence in operation of car upon approaching crossing for jury.* The question of the negligence of a street car company's servant in operating its car on approaching a crossing, having regard for the travel at that point, is for the jury.

Amos Jones, Appellant, v. Lottie Veeck et al., Appellees.

(Not to be reported in full.)

Appeal from City Court of Alton; the Hon. JAMES E. DUNNEGAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by Amos Jones, plaintiff, against Lottie Veeck, Julius F. Veeck, Julius Veeck and Rosa L. Veeck, defendants, to recover commissions for the sale or exchange of real estate. From a judgment against him, the plaintiff appeals.

J. V. E. MARSH, for appellant.

WILLIAM P. BOYNTON, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Abstract of the Decision.

1. **PRINCIPAL AND AGENT, § 72***—*when agent acting for both parties not entitled to recover commission.* While an agent's right of recovery against his principal for commissions will not be defeated where the latter had knowledge that the agent was also acting for the other party to the transaction and consented to his receipt of compensation therefor, lack of such knowledge and consent on the part of the principal will defeat the agent's action.

2. **APPEAL AND ERROR, § 1411***—*when verdict not disturbed on appeal.* Where there is a direct conflict of evidence as to the knowledge of a principal that his agent was also acting for the other party to the transaction and as to the principal's consent that the agent should receive compensation therefor, the question is one for the jury, whose verdict will not be disturbed on appeal in the absence of serious errors in the rulings on the admission of testimony or in the instructions.

3. **APPEAL AND ERROR, § 1712***—*when errors abandoned in argument not considered.* Where the appellant wholly abandons in his argument certain assignments of error on the record, the Appellate Court is not required, under the rules, to give them any attention.

4. **BROKERS, § 84***—*when evidence as to why transaction not completed competent.* In a real estate broker's action against his principal for commissions for effecting a sale or exchange of property, evidence as to why the transaction was never consummated held competent as tending to show that the broker had forfeited his right to commission.

5. **APPEAL AND ERROR, § 1410***—*when verdict not disturbed on appeal.* In the absence of serious error in the rulings of the trial court where the questions involved are principally those of fact, the Appellate Court is not warranted in disturbing the verdict of the jury unless it is against the manifest weight of evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harrold v. City of East St. Louis, 197 Ill. App. 121.

**Michael Harrold, Appellant, v. City of East St. Louis,
Appellee.**

1. MUNICIPAL CORPORATIONS, § 1139*—*when city liable for unauthorized acts of officers in misapplying proceeds of tax levy to pay tax warrants.* An action in assumpsit will lie in favor of a bona fide holder for value of tax warrants duly issued by the proper authorities of a city in anticipation of a tax properly authorized and levied, where the proceeds of the levy have been diverted by the constituted city authorities to the payment of other debts of the city, and the holder of such warrants will not be confined to his remedy against the city officers, so unauthorizedly diverting such funds, and their bondsmen.

2. MUNICIPAL CORPORATIONS, § 1139*—*when proceeds of tax levy to pay tax warrants trust fund to pay holders of warrants.* Where anticipation tax warrants have been issued, the proceeds from such tax levy when collected constitute a trust fund in the hands of the city, levying the tax, in favor of the holders of the warrants.

3. ASSUMPSIT, § 13*—*when lies against municipal corporation.* An action in assumpsit will lie against a municipal corporation to recover money owing in equity and good conscience.

Appeal from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROWE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

DAN MCGLYNN and B. H. CANBY, for appellant.

S. W. BAXTER and T. L. FEKETE, for appellee; JOHN E. HAMLIN, of counsel.

MR. JUSTICE BOGGS delivered the opinion of the court.

This is an action in assumpsit brought by appellant, plaintiff below, against the appellee, defendant below, in the Circuit Court of St. Clair county. The declaration is on the common counts, to which appellee pleaded the general issue. The damages claimed are \$25,000. A jury was waived and the cause tried by the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The trial court found the issues for appellee and rendered judgment in bar of action and for costs, from which judgment the present appeal is prosecuted.

The facts in the case are substantially undisputed. The evidence shows that in January, 1912, the city council of the City of East St. Louis passed its appropriation ordinance for the fiscal year 1912, appropriating the sum of \$576,000 for the various city expenses. In June of the same year, the annual tax levy ordinance was passed to meet such appropriation. The city having exhausted the funds in its treasury, on August 19, 1912, passed an ordinance authorizing the mayor and city comptroller to issue anticipation warrants against the taxes levied for the year 1912 to the amount of \$194,431.02, being seventy-five per cent. of said tax levy. The evidence further shows, and it is in fact conceded, that the warrants in evidence in this case were a part of the issue that was authorized and that said issue was within the seventy-five per cent. limit provided by law.

The evidence further shows that in December, 1912, the mayor and city comptroller issued other anticipation warrants amounting to over \$26,000, which with the amount theretofore authorized and issued made a total of \$221,699.86, being in excess of seventy-five per cent.

The evidence further shows that when the certificates of the mayor and city comptroller showing that the original issue of warrants was within the seventy-five per cent. limit provided by law were delivered to the Southern Illinois Trust Company, the warrants were issued by the city and delivered to the persons in whose favor they were drawn, and were presented for payment to the Southern Illinois Trust Company, and that company, in behalf of the Continental and Commercial National Bank of Chicago, paid the amount of the warrants to the holders.

The evidence further shows that appellant purchased

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these warrants from the Continental and Commercial National Bank, and paid their full face value, with accrued interest. In fact, it is admitted by appellee that appellant obtained such warrants for value and in good faith, and also that sufficient funds were received from the taxes of 1912 by the city treasurer to have redeemed said warrants in full.

The evidence further shows that one Fred Gerold was the city treasurer of the City of East St. Louis during the year 1912, and up to May 5, 1913; that as such city treasurer he was *ex officio* town collector of taxes for the Town of East St. Louis, and his delinquent return to the county treasurer shows that the net amount of city taxes of the City of East St. Louis collected by him for the year 1912, was \$154,231.98. And in his monthly report to the city council for the month of April, 1913, he charged himself, as city treasurer, with having received this amount from the city tax revenue for the year 1912.

The evidence further shows that out of the taxes received by Fred Gerold, city treasurer of said city, for the year 1912, he redeemed anticipation warrants drawn against these taxes to the amount of \$112,530.84; that included in the anticipation warrants so redeemed by him were about \$26,000 of warrants issued in December, 1912, to make what was called the "Christmas pay," that is, to pay the policemen, firemen and other city employees for back salary owing them. There were also included \$6,765.19 of anticipation warrants drawn by the mayor and city comptroller against this tax levy during the months of January, February, March and April, 1913. The limit that lawfully could be drawn was \$194,431.02, consequently the treasurer, in paying the \$26,000 and the \$6,675.19 of warrants issued as above set forth, paid out in excess of the seventy-five per cent. limit the sum of \$27,268.84. The difference between the amount of taxes received by the city treasurer, viz.: \$154,231.98, and the amount of

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anticipation warrants redeemed by him, \$112,530.84, is the sum of \$41,701.14, and this amount, the evidence shows, he paid out in taking up warrants drawn and issued by the mayor and city comptroller for current expenses authorized by the city council, instead of using said funds to take up said anticipation warrants.

The evidence further shows that a demand was made upon Fred Gerold, city treasurer, to pay the anticipation warrants held by appellant after said treasurer had received the taxes for the year 1912, against which, said warrants were drawn, and that said treasurer stated he had no funds to pay them. Thereafter a demand in writing, with a list of the warrants attached, was served on Frank Keating, the successor of Gerold as such city treasurer, and he too failed to pay them on the ground that he had no funds. The controlling question, therefore, in this case is, can appellant recover from appellee, the City of East St. Louis, the amount unpaid on said anticipation warrants held by him, or is his only remedy against Fred Gerold, former city treasurer of said city and his bondsmen.

Appellant contends, first, that the statute (chapter 146a, sec. 2, Rev. St. 1911, J. & A. ¶ 11525), by authority of which the anticipation tax warrants in evidence were issued, imposes the duty upon the "proper authorities" of the municipal corporation issuing and disposing of such warrants, to set apart and hold the taxes against which they are drawn for their payment, and for any negligent or wrongful failure to perform this duty, after the taxes have been collected and are in the municipal treasury, the city will become liable generally to the holders of the warrants to the extent of the taxes so received, as for money had and received to the use of the warrant holders.

The second contention is that irrespective of the requirements of the statute, if a city, having made provision for issuing warrants in anticipation of a tax already levied, in payment of the ordinary and neces-

sary expenses thereof, issues and disposes of such warrants, and after the taxes out of which such warrants are payable have been collected and are in the city treasury, the city, either by the direct act of its council, or by and through the wrongful acts of its duly authorized officials in charge of the administration of its fiscal affairs, causes said taxes to be diverted from the payment of said warrants, and to be applied to other corporate purposes, the city will thereby make itself liable generally to the holders of the warrants to the amount of such taxes so diverted.

On the other hand, appellee claims that there is no liability on its part to appellant in this case for the reason that these anticipation warrants held by appellant provide on their face that they are to be paid out of the taxes of 1912 and not otherwise, and that appellant's sole remedy to recover the amount owing to him on said warrants is by suing the former treasurer of said city and his bondsmen.

The Supreme Court of this State in the cases of *City of Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; and *Fuller v. Heath*, 89 Ill. 295, define the law governing municipal corporations which are already indebted up to the constitutional limit in reference to issuing anticipation warrants against a tax already levied. These limitations were, first, that the tax appropriated must at the time be actually levied; second, the legal effect of the contract between the corporation and the individual made at the time of issuing and accepting the warrants on the treasury must operate to prevent any liability to accrue on the contract against the corporation, the duty remaining for the proper officers to collect and pay over the tax; that for any failure in that regard, the remedy must be against the officers, and not against the corporation. Otherwise a contingent debt would in this way be incurred by the corporation. The effect of these decisions was to relieve municipal corporations indebted

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up to the constitutional limit, in issuing anticipation warrants against a tax already levied, from all duty or responsibility for the application of the taxes when collected to the payment of the warrants drawn against it, and to cast that duty upon the officers, who are by law required to collect and pay over the taxes.

At the time these cases were decided, there was no statute in this State regulating and controlling the manner in which municipal corporations might issue anticipation warrants against a tax already levied. After these decisions were rendered, such a statute was enacted. The Legislature by an Act approved May 31, 1879, in force July 1, 1879, and which with amendments made in 1901, is now chapter 146a, Rev. St. 1911 (J. & A. ¶¶ 11524-11527), provided by section 2 of said Act (J. & A. ¶ 11525) the manner in which municipal corporations might thereafter issue anticipation warrants against a tax already levied. This section makes it lawful for "the proper authorities" of the municipal corporations therein mentioned, whenever there is not sufficient money in the treasury to meet and defray the ordinary and necessary expenses thereof, to provide a fund to meet said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by "said authorities" for the payment of the ordinary and necessary expenses thereof, to the extent of seventy-five per centum of the total amount of any such tax levy. The proviso to the section requires that the warrants shall show upon their face that they are payable solely from said taxes when collected and not otherwise, and shall be received by any collector of taxes in payment of the taxes against which they are issued. The last clause thereof provides: "And which taxes against which said warrants are drawn shall be set apart and held for their payment."

The language of the last clause of this section is general. It names no one to perform the duties which it

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imposes, and its application is to be determined from a consideration of the entire section when read together as a whole. When so read, it is at once perceived that no one is mentioned anywhere in the section to whom the duty of setting apart and holding the taxes for the payment of the warrants can be referred, except "the proper authorities," who have already levied the tax, and who have drawn and issued the warrants against the same. This section confers a power, to be exercised in a certain way, and subject to certain prescribed limitations, burdened with the performance of a certain duty, annexed to the exercise of the power; the duty being imposed upon those upon whom the power is conferred.

This section of the statute has never been construed by the Supreme Court with reference to the question as to whether the last clause creates a corporate duty, for the negligent or wrongful failure to perform which, the municipality may become liable to the warrant holder generally, in the same way that it may become liable for its negligent or wrongful failure to perform any other duty devolved upon it by law. It would seem, however, that the holding of the Supreme Court made before the enactment of this statute, as applied to municipal corporations indebted beyond the constitutional limit, to the effect that the only remedy of the warrant holder is against the collecting officers for a failure to pay the warrants when the taxes have been collected, has been abrogated by this statute; that while the warrants create no debt against the municipality, being payable solely from the taxes, when collected and not otherwise, yet the statute imposes the duty upon the municipal authorities issuing the warrants, to set apart and hold the taxes, against which the warrants are drawn, when collected, for their payment, and that for the negligent or wrongful failure to perform that duty, the municipal corporation may render itself liable, in the same way, and to the same extent

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that it may become liable for the nonperformance of any other duty imposed upon it by law. The fact that some municipal corporations in the State may be indebted up to the constitutional limit, in no way affects the competency of the Legislature to impose this duty upon all municipal corporations in the State issuing anticipation warrants under this statute. It is not in violation of section 12, article 9, of the Constitution which prohibits municipal corporations from becoming indebted beyond five per cent. of the value of their taxable property. The act does not create a debt or claim against any municipal corporation. If no person suffers damage from a failure to perform the duty, no debt or charge will ever be created. The fact that a cause of action may arise from the neglect of this duty is no more a debt against the city or municipality than is the right of recovery against such municipality for any other wrong or injury. *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372.

If our construction of the statute in this respect is correct, then the duty of the municipalities issuing anticipation warrants to set apart and hold the taxes against which they are drawn for their payment, is precisely analogous to the duty of cities and villages making local improvements under the Local Improvement Act of this State, to set apart and hold the special taxes or assessments against which vouchers and bonds have been issued for their payment.

Sections 73 and 90 of the Local Improvement Act (chapter 24, Rev. St. 1911, J. & A. ¶¶ 1464, 1465) provide that no person or persons taking any contract from any city, village or town and agreeing to be paid out of special assessments or special taxes, shall have any claim or lien upon the city, village or town in any event, except from the collection of the special assessments or special taxes made for the work contracted for, and no person or persons accepting the vouchers or bonds provided for in the act shall have any claim

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or lien upon the city, town or village in any event, for the payment of such vouchers or bonds, except from the collection of the assessment against which such vouchers or bonds are issued. Section 12, art. III, ch. 24, Rev. St. 1911, provides that all money received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement.

The Supreme Court in passing on these sections of the Local Improvement Statute has held that a city is powerless to make itself liable by ordinance for special assessment bonds, vouchers or interest. *Village of Park Ridge v. Robinson*, 198 Ill. 571.

However, the court in said case states an exception to the doctrine of nonliability in the following language: "As a general rule, it will be found that in the cases in which the municipal corporation has been held to a general liability, there has been some wrongful act, negligence or default on its part which injuriously affected the rights of the claimant."

In the case at bar, one of the grounds of recovery claimed by appellant is that the taxes against which the anticipation warrants were issued were collected and received by the city treasurer, and that under the statute it was the duty of the city to set apart and hold these taxes for the payment of the warrants. The city neglected and failed to do this, but on the contrary, has drawn warrants on its treasurer, and has allowed him to pay out the funds in his hands which should have been used for the payment of these anticipation warrants, whereby appellant's right to have his warrants paid out of said tax was wholly lost.

In the case of *Conway v. City of Chicago*, 237 Ill., pages 135 and 136, the Supreme Court in passing on the provisions of the above mentioned sections 73 and

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90 of the Local Improvement Act, and section 13, art. III, ch. 24, Rev. St. 1911 (J. & A. ¶ 1313), says: "The improvement having been projected by the city as an improvement to be paid for by special assessment, the city is not liable, generally, for any unpaid balance due the contractor. The liability of the city, both under the law and under the contract with appellee, is limited to the amount of the special assessments actually collected for this improvement and which have not been paid over to appellee. * * * Where the special assessment has been levied and collected by the city and nothing remains to be done except to pay it to the party entitled to it, assumpsit is a proper remedy to compel the city to pay it over." The court further says: "The funds collected from this special assessment constituted a trust fund to pay for the improvement, and the city had no right to transfer them to other funds and draw on them indiscriminately for pay rolls of inspectors, engineers, accountants and other officers and employees of the special assessment department, without regard to the improvement with respect to which such services were rendered or expenses incurred. * * * Appellant having thus wrongfully diverted these amounts is liable therefor in this action."

The court further says: "While appellee's ownership of past-due bonds issued in anticipation of this special assessment is a necessary element in his right to recover in this case, still this is not a suit upon the bonds in the sense that the recovery must be according to the tenor and effect of the instruments, but it is essentially a suit against the city for money had and received to the use of appellee which in good conscience ought to be paid to him."

It would seem that the duty of the city to pay vouchers or bonds issued under the Local Improvement Act out of special assessments against which they are drawn, when the special assessment has been

collected, is no greater than the duty of a city, having issued anticipation warrants against a tax levy to set apart and hold the taxes against which they are drawn for their payment. It is a statutory duty in each case. As the Supreme Court holds the city liable in the one case we see no reason why it should not in the other.

Appellee relies on the case of *Schulenburg & Boeckler Lumber Co. v. City of East St. Louis*, 63 Ill. App. 214, that being a case where plaintiff, said Lumber Company, brought suit against the City of East St. Louis upon the theory that it was also the holder of anticipation warrants; that the taxes out of which such warrants should have been redeemed had actually been collected, but that the funds derived thereby had been wrongfully and tortiously diverted to pay other expenses of the city, in which case the city was held not liable. We believe, however, since the amendment of 1901 to the statute in reference to issuing anticipation warrants, and in view of the holding of the Supreme Court in *Conway v. City of Chicago*, *supra*, that, the *Schulenburg & Boeckler* case, *supra*, would not be an authority in this case and should not be followed, the statute having been materially amended since such decision was rendered.

We further believe that appellant has the right to recover from appellee in this case on the ground that in equity and good conscience, having received from its city treasurer the funds derived from the taxes out of which these warrants held by appellant were to have been paid, and having expended these funds in the payment of its ordinary current expenses and the city having had the benefit of said funds, it would be liable to the appellant therefor in an action of assumpsit for money had and received.

It is conceded in this case, both by appellant and appellee, that the anticipation warrants issued in this case do not create any indebtedness against the city; that it amounts in effect to an assignment to the appel-

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lant of so much of the taxes then levied as is necessary to pay said warrants. That being true, the city had no right whatever, after said warrants had been issued and the city had received the money on the same as provided by statute, to receive or expend said taxes, and having done so it would be liable therefor.

We further hold that having caused the issue of said anticipation warrants and having received the funds therefor, it was the duty of the city to in no way hinder or delay the holder of said warrants from receiving payment therefor out of the taxes to be collected; that rightly, it was the duty of the city authorities to see to it that the funds necessary to take up these anticipation warrants be set aside when collected and held as a trust fund for said purpose. The city authorities have failed and neglected so to do, but instead thereof have issued warrants directed to its treasurer, and with knowledge thereof have allowed said treasurer, out of the funds which he had collected, and which should have been held as a trust fund to take up said anticipation warrants, to expend said funds in the payment of said warrants so drawn for the ordinary running expenses of said city.

There is quite a line of decisions in this State to the effect that an action in assumpsit will lie to recover money owing in equity and good conscience from one person to another, even though that person should be a municipal corporation, such as the defendant in this case, some of which we will refer to.

In the case of *Trustees, etc. v. Trustees, etc.*, 81 Ill. 470, being a case where trustees of schools, as such, are sued for funds which came into the hands of their treasurer and were appropriated by them as such trustees, were sought to be held as trustees of schools in action to recover said funds, the court at page 473 says: "But it is said that this money was paid to the treasurer as an individual, and the trustees controlled it as individuals, and the recovery should be had

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against them as individuals. The money was ordered to be paid to the treasurer, and not the individual holding the office; and he received it as treasurer, loaned it as treasurer, and the trustees ordered him to pay it out as treasurer. Nor did the trustees assume the control of the fund as individuals. All they did, so far as we can see, was as trustees and not as individuals.

“But it is said that the treasurer had no power, as an officer, to receive the money, nor did the trustees have a right to control it as officers. To admit this position would be to hold that the corporation could be held liable for no wrongful act of its officers. If, through mistake, they should collect money not owing to the fund, and it were placed in the treasury, the corporation could hold it, and the person wronged would be compelled to look to the individual officers for his money. It would be to hold that whatever funds found their way into the school treasury, they might hold it, however unjust or dishonest. Such cannot be the law, as it shocks every principle of right. Such corporations, like individuals, must, when they obtain and hold the money of another, be held to refund it. There are many acts of such officers for which such corporations are not liable, but this is not of that class.”

In the case of *City of Elgin v. Joslyn*, 136 Ill. 525, being an action in assumpsit brought by John Joslyn against the City of Elgin to recover for work and materials furnished by appellee in the construction of the Elgin water works. The declaration contained the common counts only. There was a written contract between the parties, but the claim as made is for extras and extra work and materials. At page 530 the court says: “The undisputed evidence on both sides shows, that, at a certain point, the city took charge of the work and finished it.” At page 532 the court says: “When plaintiff quit the work begun by him, he left in the hands of the city certain materials, tools and ma-

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chinery. The materials were used, and the tools and machinery were destroyed by the city in the completion of the work. It is objected, that the plaintiff was allowed to introduce evidence of these facts upon the trial, and to recover for the value of the property thus used up and destroyed.

"It is claimed, that the act of the city in using and appropriating this property of the plaintiff was a tort, and that the city is not liable in this action of assumpsit. Appellant's position is, that assumpsit will not lie when property is wrongfully taken, unless it is converted into money, or money's worth, or there has been a subsequent promise to pay for the same. We do not think that such is the law as applied to the facts of this case. The act of the city may have been tortious, but the plaintiff had the right to waive the tort and sue in assumpsit, as the city applied the property to its own use and benefit. Where one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort, and charge the wrongdoer in assumpsit on the common counts, as for goods sold, or money received. (*Toledo, W. & W. Ry. Co. v. Chew*, 67 Ill. 378.)"

In the case of *Highway Com'rs v. City of Bloomington*, 253 Ill. 164, an action of assumpsit based upon the common counts, was brought by the Highway Commissioners of the Town of Bloomington against the City of Bloomington to recover from said city the amount of taxes collected on property in Bloomington township, located within the corporate limits of the City of Bloomington and paid over by the collector of revenue to the city under the third provision of section 16 of the Road and Bridge Law as amended in 1909 (J. & A. ¶ 9643). This law had been previously declared unconstitutional, and this suit was brought to recover said taxes for that reason. In this case the court discusses at great length the right to bring actions of assumpsit in this character of cases and cites numerous

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authorities, both in this State and in other States and from the United States Supreme Court reports.

At page 174 the court says: "The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned. (*Gaines v. Miller*, 111 U. S. 395; *Pauly v. Pauly*, 107 Cal. 8; *Brown v. Woodward*, 75 Conn. 254; *Wilson v. Turner*, 164 Ill. 398.) The action is in form *ex contractu*, but the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant and no privity is necessary. * * * The right to recover is governed by principles of equity although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex aequo et bono* belongs to another. (*Jackson v. Hough*, 38 W. Va. 236; *Merchants' Bank v. Barnes*, 47 L. R. A. 737.)"

Again at page 175 the court says: "A public *quasi* corporation, such as a county, which receives taxes and applies them all to its own use when it should pay bonds issued by the town out of such taxes, is liable to such town therefor. (*Strough v. Jefferson County*, 119 N. Y. 212; 23 N. E. Rep. 552.) Where a county receives money belonging to other persons without authority it must refund to such persons. (*Chapman v. County of Douglas*, 107 U. S. 348.) Where taxes are paid to a county by a sheriff when they should have been paid to a city, the city may recover such taxes from the county. (*Salem v. Marion County*, 25 Ore. 449; 36 Pac. Rep. 163.) * * * Where a school trustee expends money for the actual benefit of township schools which by law he is required to pay over to another school corporation, such township is liable to

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such corporation for the amount of money thus expended. (*Center School Township v. School Com'rs*, 150 Ind. 168; 49 N. E. Rep. 961.)”

In the case of *Warner v. City of New Orleans*, 167 U. S. 467, the court in passing on a question, not unlike the one at bar, says: “One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, You must look to the fund, and not to me.”

In the case of *City of Louisiana v. Wood*, 102 U. S., page 298, being a case where the municipal authorities of the City of Louisiana, Missouri, in order to avoid the effect of a statute recently passed, prohibiting the issuing of city bonds, dated the bonds of a date anterior of the passage of the statute. Mr. Justice Waite, in disposing of that case, uses the following language: “In *Moses v. Macferlan*, 2 Burr. 1005; it is stated as a rule of the common law that an action ‘lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition.’ The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh v. Fulton County*, 10 Wall. 676: ‘The obligation to do justice rests upon all

persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * The only contract actually entered into is the one the law implies from what was done, to wit: that the city would, on demand, return the money paid to it by mistake, and, as the money was gotten under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seeks to enforce in this action and no other."

It will be observed from an examination of the above authorities that municipal corporations are, like individuals, held to account for money received by them, which in equity and in good conscience belongs to another, and that an action in assumpsit will lie in favor of the person to whom the money belongs against such municipal corporations to recover the same. In the case at bar it would certainly seem that the City of East St. Louis having, through its officers, obtained the funds which legally and equitably should have gone in payment of anticipation warrants held by appellant, would be liable therefor to the extent that the revenue, which should have gone in payment of said warrants, was so used by said city, and this we believe to be the holding of our Supreme Court in this character of case.

A great deal was said in the oral argument of this case and in the written briefs with reference to the dual nature of a city, and while the authorities hold that a city has such dual relations and that so far as those functions are concerned which are held to be governmental, the city is not liable for the action of its officers, still we do not believe that the duties of cities in the carrying out and the execution of its ordinary affairs as a city comes under that head. In

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those matters it is liable for its acts and the acts of its officers, just the same as an individual.

For the reasons above set forth, we believe this cause should be reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

Margaret Harroun, Appellee, v. T. E. Benton, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by Margaret Harroun, plaintiff, against T. E. Benton, defendant, in the Circuit Court of Williamson county, to recover for personal injuries alleged to have been sustained as a result of the negligent operation of defendant's automobile. From a judgment for plaintiff for \$700, defendant appeals.

The declaration was in six counts, in general, charging defendant with negligence in the operation of his automobile, and with driving such automobile at a speed in excess of twenty-five miles an hour, with failing to give warning of its approach, and with failing to stop when it was apparent that plaintiff's horse was frightened thereby. Defendant pleaded the general issue, and on a trial by jury plaintiff recovered a verdict.

It appeared that plaintiff and a Mrs. Sanders drove to the home of a Mrs. Newton, in a one-horse buggy,

for the purpose of buying some eggs. Just prior to the accident plaintiff and Mrs. Sanders were sitting in the buggy on the north side of the road in front of Mrs. Newton's house, talking to Mrs. Newton. The horse and buggy were facing west. While the women were talking Mrs. Newton stated to plaintiff and Mrs. Sanders that an automobile was crossing the bridge. It appeared that this bridge was about five or six hundred feet east of where the horse was standing.

It further appeared that plaintiff and Mrs. Sanders at once alighted and plaintiff went around to the horse's head, and taking hold of the bridle began leading the horse into a lot at Mrs. Newton's. Plaintiff testified that as soon as she heard that an automobile was coming, she and Mrs. Sanders at once got out, and she took hold of the horse's bridle; that the automobile was coming at a rate of speed estimated by her at from thirty to thirty-five miles per hour; that the horse at once became frightened, and began to kick and plunge and dragged her into the lot and circled around and finally threw her to the ground. Plaintiff's chief injury was to her knee, which she testified was still swollen and caused her pain at the time of the trial, some six months after the injury. Evidence for defendant tended to contradict plaintiff as to the speed at which the car was running at the time of the accident, and to show that the horse was inside the lot when the car passed, and did not become frightened until after the car passed.

DENISON & SPILLER, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when verdict not disturbed.* Where the evidence is conflicting the verdict will not be disturbed on appeal unless on a careful reading of the evidence it can be said that the verdict is against its manifest weight.

2. APPEAL AND ERROR, § 1411*—*when verdict will not be set aside.* Where the evidence is conflicting a verdict will not be set aside if the facts and circumstances, by a fair and reasonable intendment, will warrant the verdict, although such verdict may appear to be against the strength and weight of the evidence.

3. TRIAL, § 153*—*what is province of jury regarding evidence.* It is the peculiar province of the jury to weigh evidence and to reconcile it if possible, or to decide the issues according to the weight of the evidence, if the evidence is irreconcilable.

4. AUTOMOBILES AND GARAGES, § 3*—*when instructions drawn on theory that law governing operation of automobiles inapplicable to team on private grounds properly refused.* In an action to recover for personal injuries alleged to have been sustained as a result of the alleged negligent operation of defendant's automobile, frightening plaintiff's horse and causing plaintiff to be thrown down and injured, where it appeared that at the time of the accident plaintiff's horse was in a private lot to which plaintiff had led it from the highway on the approach of the automobile, instructions requested by defendant drawn on the theory that the law governing the operation of automobiles on public highways did not apply to teams on private grounds, held properly refused.

5. INSTRUCTIONS, § 151*—*when requested instruction properly refused.* Requested instructions substantially covered by instructions already given are properly refused.

6. INSTRUCTIONS, § 96*—*how instructions on credibility of witnesses should be framed.* Instructions as to the credibility of witnesses should be general in character and should not call particular attention to any witness.

7. DAMAGES, § 127*—*when verdict not excessive.* In an action to recover for personal injuries, where it appeared that plaintiff sustained an injury to her knee as well as being otherwise bruised and injured, but where the evidence was conflicting as to the extent of plaintiff's injuries, a verdict for plaintiff for seven hundred dollars held not excessive, it appearing that at the time of the trial plaintiff was still suffering from the injuries, and was more or less disabled thereby.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Eliza A. Todd, Administratrix of the Estate of Jonathan N. Todd, Deceased, Appellee, v. Louisville & Nashville Railroad Company, Appellant.

1. TRIAL, § 155*—*what is province of jury as to evidence.* Where the evidence is conflicting it is for the jury to say what facts are proved.

2. APPEAL AND ERROR, § 1411*—*when verdict not disturbed on appeal.* The finding of a jury as to what facts are proved by conflicting evidence will not be disturbed unless there was error in rulings on evidence or in instructions.

3. CARRIERS, § 307*—*how relation of carrier and passenger may arise.* The relation of passenger and carrier is contractual, and requires the assent of the carrier, express or implied, before it can arise.

4. CARRIERS, § 306*—*when assent to receive person as passenger not implied.* No assent of a carrier to receive a person as a passenger can be implied unless the passenger presents himself in a proper manner and condition, and at a proper time and place.

5. CARRIERS, § 251*—*when duty arises to accept and transport persons desiring to become passengers.* A railroad company owes to persons desiring to be transported the duty of accepting and transporting them, provided they present themselves at a proper time and place, and in a proper manner and condition, and tender or are willing to pay the necessary fare.

6. CARRIERS, § 310*—*when person may become a passenger.* A person may be a passenger on a railroad train without procuring a ticket.

7. CARRIERS, § 310*—*when person without ticket becomes passenger.* A person who boards a train and reaches a place of safety thereon is a passenger although the agent of the carrier refuses to sell such passenger a ticket, and, although defendant's porter attempts to prevent such passenger from entering the train, provided the passenger is able and willing to pay fare, and provided he is in a proper condition to be received as such.

8. CARRIERS, § 480*—*when question whether passenger in proper condition to be received for jury.* Whether a passenger is in a proper condition to be received as such is a question of fact for the jury on the evidence.

9. CARRIERS, § 476*—*when evidence sufficient to sustain finding that passenger not intoxicated.* In an action to recover for the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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death of plaintiff's intestate, where there was evidence that deceased attempted to board a moving train and had reached a place of safety thereon but was pushed off the steps of a car by defendant's porter, causing deceased to fall under the wheels and be killed, evidence of plaintiff *held* sufficient, if believed, to sustain plaintiff's claim that at such time deceased was not intoxicated and was ready, able and willing to pay his fare, although there was also evidence that shortly prior to attempting to board the train deceased had been drinking.

10. CARRIERS, § 278*—*what is duty of carrier to protect passenger from injury.* A person who boards a train and is ready, able and willing to pay his fare is a passenger, if not intoxicated, although shortly prior to boarding the train such passenger may have been drinking, and as such is entitled to the use of reasonable care and diligence on the part of the carrier and its servants to protect him from injury.

11. CARRIERS, § 535*—*when trespasser may not be forcibly ejected.* A railroad company has no right while a train is in motion to forcibly eject a trespasser who has reached a place of safety on the train, and will be liable for any injury caused by such ejection before the train has been stopped so that ejection will not endanger such trespasser's life.

12. RAILROADS, § 517*—*what duty owed to trespasser.* A railroad company owes no duty to a trespasser other than that owed to other strangers.

13. CARRIERS, § 535*—*what is right of trespasser as to freedom from injury.* A trespasser on a train does not, by being such, forfeit the right inhering in every person as against every other person to be free from wilful and intentional injury by such other person.

14. CARRIERS, § 340*—*when liable for acts of servants.* A railroad company is liable for the acts of a servant within the scope of the duty and authority of such servant.

15. CARRIERS, § 340*—*when porter acts within scope of his authority.* In an action to recover for the death of plaintiff's intestate where there was evidence that deceased attempted to board a moving train and had reached a place of safety thereon but was pushed off the steps of a car by defendant's porter, causing deceased to fall under the wheels and be killed, *held* that the act of the porter was within the scope of his authority.

16. CARRIERS, § 480*—*when question whether passenger attempting to board train guilty of contributory negligence for jury.* In an action to recover for the death of plaintiff's intestate, where there was evidence that deceased attempted to board a moving-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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train and had reached a place of safety thereon, but was pushed off by defendant's porter, causing deceased to fall under the wheels and be killed, but where the evidence was conflicting, the question whether deceased was guilty of negligence contributing to his death *held* a question of fact for the jury.

17. CARRIERS, § 526*—*when evidence sufficient to sustain finding that porter forcibly pushed person from car.* In an action to recover for the death of plaintiff's intestate, where there was evidence that deceased attempted to board a moving train and reached a place of safety thereon, but was pushed from the steps of a car by defendant's porter, causing deceased to fall under the wheels and be killed, but where the evidence was conflicting, *held* that a finding of the jury that such porter forcibly pushed deceased from the car should not be disturbed, it appearing that the question was fairly presented to the jury.

18. INSTRUCTIONS, § 151*—*when requested instructions properly refused.* Requested instructions containing correct principles of law applicable to a case are properly refused where they are covered by others already given.

19. INSTRUCTIONS, § 20*—*when properly refused.* Instructions calling the attention of the jury to their examination prior to being accepted and sworn are properly refused.

20. APPEAL AND ERROR, § 1490*—*when exclusion of evidence not reversible error.* In an action to recover for the death of plaintiff's intestate, where there was evidence that deceased attempted to board a moving train and reached a place of safety thereon, but was pushed from the steps of a car by defendant's porter, causing deceased to fall under the wheels and be killed, the refusal of the trial court to permit the examination by defendant of a witness called by it as to an alleged statement made by the witness, such examination being sought for the purpose of refreshing the recollection or of awakening the conscience of the witness, *held* not reversible error although the court might properly have allowed the examination, it not appearing that the ruling affected the case in any material way.

Appeal from the Circuit Court of Hamilton county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

JAMES M. HAMILL and CHARLES P. HAMILL, for appellant.

H. ANDERSON and T. H. CREIGHTON, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE BOGGS delivered the opinion of the court.

This was an action on the case brought by appellee, against the Louisville & Nashville Railroad Company, to recover damages for the death of her husband. The declaration as originally filed consisted of five counts. The trial court, however, instructed the jury to find for the defendant on the first two counts.

The third count avers that Todd was waiting to become a passenger, and was ready, willing and able to pay his fare after he had entered the train; that while he was endeavoring to do so, the defendant negligently started its train and by its servants violently, carelessly, negligently and improperly pushed Todd off the train, while in motion, causing him to fall under the wheels.

The fourth count is practically the same as the third. The fifth count alleges that while Todd was endeavoring to enter the train, the defendant's servants seized him with great force and violently pushed, pulled and struck him to prevent him from entering the train, and negligently and improperly caused him to fall under the wheels of the train.

The defendant filed the general issue, a trial was had and the jury returned a verdict for \$3,000. A motion for a new trial was overruled, and judgment rendered, from which judgment this appeal is taken.

The facts as they appear from the evidence are that Todd, a man of about thirty-five years of age, living at Bell Prairie, Illinois, where he operated a telephone exchange and was engaged in the insurance business, on the day he was killed went to Carmi to transact some business with the agents of the Insurance Company for which he was working. Todd finished his business at Carmi with the insurance agents between 1:30 and 2 o'clock in the afternoon. The train from McLeansboro was due to leave about 3:20. It is claimed by appellant that Todd left the insurance office and went more or less directly to the L. & N. station, where

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he tried to buy a ticket about 2 o'clock p. m., but the agent refused to sell him one because, as the agent testified, he appeared to be under the influence of liquor. It is also claimed by appellant that Todd went to a saloon not far from the railroad station where he was seen to take two or three drinks. Todd returned to the station perhaps twenty minutes before train time, where he was seen by several persons to drop his overcoat, breaking a bottle of whisky he had in the pocket. After this he returned to the saloon and purchased one or two bottles of whisky and then came back to the station, where he was seen talking with an insurance man named Garrison at the time the train pulled in.

The evidence on the part of appellant is also to the effect that Todd at this time was more or less under the influence of liquor and was pronounced by several witnesses who testified on the trial to be intoxicated. On the part of appellee the evidence is to the effect that while Todd may have taken two or three drinks he was not intoxicated, but was apparently sober at the time he was seen at the railroad station just prior to the accident.

The undisputed evidence is also to the effect that Todd was having a more or less heated conversation with a man by the name of Garrison at the time the train pulled in. The train waited at the station some three or four minutes and the evidence of appellant tends to show that the bell rang and the train had begun to move before Todd attempted to get on, while the evidence of appellee's witnesses is to the effect that Todd attempted to board the train before it started. The evidence of all the witnesses who saw the accident is that Todd attempted to get on the train at the front end of the smoker. As to what happened after Todd attempted to board the train there is a conflict of evidence, the witnesses for appellant testi-

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fying to the effect that Todd was intoxicated and that the colored porter refused to let him get on the train on account of such intoxication. The evidence of appellant is further to the effect that the colored porter was between Todd and the train when the rear end of the smoker came along, and that he prevented Todd from getting on the train at this time, and that when the rear end of the ladies' car came along the porter grabbed the hand rails and got on the car. The train at this time was running some six to ten miles per hour. The evidence of appellant is further to the effect that Todd again attempted to get on the train, and had apparently caught the rear hand rail of the vestibule coach next back of the ladies' coach, the door of which was shut, making it impossible for him to get on there. Todd had his overcoat over his left arm, the train was moving rapidly, whereupon he was thrown upon the platform and rolled under the train. The evidence of appellant further tended to show that the porter did not touch Todd when he made his last attempt to get on the train. On the other hand, the witnesses on the part of appellee testified that the train had not started when Todd attempted to board the same at the front end of the smoker; that after he attempted to get on, the porter prevented him from doing so and raised his hand and pushed him back. Todd then tried to get on the rear end of the smoker where the porter again pushed him off. Todd then stepped back towards the rear end of the ladies' coach and took hold of the handle bar and stepped on the lower step. At this time the porter took hold of him and shoved or pushed him away and threw him from the car on the edge of the platform, where he fell under the coach, was run over and killed.

As in most cases, the testimony was more or less conflicting, but the above statement substantially covers the same. There being a conflict in the evidence it was for the jury to say what facts were proved, and

its finding cannot be disturbed, if the court did not err in its ruling on the evidence and in the giving of its instructions.

It is contended by appellant, first, that appellee's intestate was not a passenger on appellant's train; second, that the porter was acting beyond the scope of his authority in pulling him from the steps of the car; and third, that the plaintiff's intestate was killed or mangled in endeavoring to board the car while the train was moving.

Appellant devotes a large part of its brief and argument in support of its first proposition that Todd was not a passenger at the time the accident occurred, the argument being that the relation of passenger and carrier is a contractual relation requiring an express or implied assent on the part of the carrier before it can arise; and that there can be no implied assent on the part of the carrier to receive one who does not present himself in a proper condition and manner and at a proper place and time.

In support of this proposition counsel for appellant cites numerous authorities, all of which we think substantially support his proposition, but we do not think it follows, as a proposition of law from the authorities cited, that appellee's intestate was not a passenger of appellant at the time of the accident. A railroad company owes a duty to persons desiring to be carried, to accept and carry such persons, providing they present themselves at a proper time and place, and in a proper manner, and condition, and tender or be willing to pay the necessary fare. This proposition is so elementary and fundamental that it needs no citation of authorities for its support.

We do not understand appellant to contend that a person must necessarily procure a ticket in order to become a passenger and we do not understand that to be the law. *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 486; *Merrill v. Michigan Cent. R. Co.*, 158 Ill. App.

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40; Elliott on Railroads, sec. 1879; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115.

Appellant contends that Todd applied at the ticket office for a ticket and, that, because of his intoxication, the agent refused to sell him a ticket, that it necessarily followed that at the time he had not become a passenger, and that when he applied for admission to the train and the porter refused to permit or allow him to board the train, that he was still not a passenger. For the sake of the argument it can be admitted that appellant's contention on these points is well taken, still we are of the opinion that notwithstanding the fact that the agent refused to sell Todd a ticket, and notwithstanding that the porter attempted to prevent Todd from boarding the train, if Todd did board the train, and did reach a place of safety, he would then become a passenger, providing he was able and willing to pay his fare, and providing also he was in a proper condition to be received as such. As to whether he was in proper condition and as to whether he was ready, able and willing to pay his fare were questions of fact for the jury under the evidence. The evidence on the part of appellee if taken by the jury was abundantly sufficient to sustain appellee's claim that Todd at the time he boarded the train was not intoxicated and was ready, able and willing to pay his fare, and if this be true, he was then a passenger, and it was the duty of the defendant and its servants to use all reasonable care and diligence to protect him as such. We go further and say that we believe the law in this State to be that, conceding Todd to have been a trespasser as claimed by the appellant, still if he had reached a place of safety on the train then even though he were a trespasser, the defendant company would have had no right to forcibly eject him while the train was in motion. Before the defendant could have removed Todd from its train after it had started, it must

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stop its train so as not to endanger his life, and to do otherwise would render the company liable.

Second, it is next contended that even though the colored porter did push, pull or remove Todd from the train, under the circumstances claimed by appellee whereby he lost his life, that the company would not be liable because the act would be beyond the scope of the duties and authority of the said porter.

A number of authorities are cited by appellant's counsel which it insisted go in support of their contention that the act of the porter was without the scope of his authority. We have examined these cases and we find that in not one of them is the question of the liability of a railroad company for the act of its porter in ejecting a passenger from its train involved.

In the case of the *Illinois Cent. R. Co. v. King*, reported in 179 Ill. 93, being one of the cases relied on by appellant, we find that the question involved in that case was whether the railroad company was liable for the act of its brakeman in ejecting a trespasser from one of its freight trains. At page 93 the court in its opinion says: "Plaintiff was a trespasser, and defendant owed him no duty other than such as it owed to any stranger. But although he was a trespasser he did not forfeit the right which inheres in every person as against every other person in all conditions, that defendant should not wilfully and intentionally inflict an injury upon him. * * *

"There was evidence tending to prove that the act of the brakeman was wilful. He pulled the plaintiff from under the cars when the train was running at a speed of six or eight miles an hour, and manifested his feeling and willingness to inflict a needless injury upon plaintiff by cursing him and throwing a stone at him.

"The liability of defendant rests upon the further question whether the act of the brakeman was in the

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course of his employment and authority as a servant of the defendant. If he was acting within the scope of his duty and employment the defendant would be liable for his act," citing *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485. "There was no want of evidence to show that the brakeman did the act within the scope of his duty. He testified as follows: 'Our instructions are to stop and put them off if we find some one beating their way.' * * * This evidence shows conclusively that it was within the scope of his directions and duties to put trespassers off the train." The court in this case held the railway company liable for the act of the brakeman.

In the case at bar the porter, we think, in view of the evidence disclosed by the record, was acting within the scope of his authority.

Again it was contended by appellant that plaintiff's intestate was guilty of negligence as a matter of law in attempting to board a moving train. We think, however, that in view of the conflicting evidence as to what actually occurred at the time Todd attempted to board the train, and as to whether or not he did board the train and reach a place of safety, renders the question of whether he was guilty of negligence contributing to his injury, a question of fact for the jury. The question was fairly presented to the jury as to whether or not the porter did forcibly push Todd from the cars, and their finding in that matter we think should not be disturbed. Appellant also assigned error on the giving of instructions on the part of appellee and on the refusal of instruction offered by appellant.

Appellee only offered two instructions and those were such as have been frequently approved by this and the Supreme Court. Twenty-four instructions were given at the request of appellant, and an examination of these instructions demonstrates that the trial court fairly instructed the jury on every phase of appellant's case.

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We find that as to the instructions that were refused, all of them so far as they embodied correct principles of law applicable to the case at bar were covered by other instructions given by the court on behalf of appellant. Instruction thirty-three asked by the appellant and refused by the court calling attention of the jury to their examination prior to their being accepted and sworn, we think, was improper and the trial court was right in refusing the same.

Appellant also contended that the court erred in refusing to permit the witness Myrle Sefried, called by it, to be questioned in regard to an alleged statement he was claimed to have made for the purpose of refreshing his recollection or awakening his conscience.

We are inclined to the opinion that the court should have allowed these questions to have been asked, but we do not think that their refusal would constitute reversible error. In fact we do not see how this ruling could in any way materially affect the case.

Accordingly the judgment of the Circuit Court is affirmed.

Affirmed.

George v. Illinois Central Railroad Co., 197 Ill. App. 152.

William George, Appellee, v. Illinois Central Railroad Company, Appellant.

1. CARRIERS, § 482*—*when instruction erroneous as not conforming to evidence.* In an action of trespass by a passenger to recover for being wrongfully removed from a railroad train on the ground that plaintiff was intoxicated, an instruction that exemplary damages might be awarded if it was found that, in removing plaintiff, defendant's servant threw plaintiff down, *held* erroneous, there being no evidence that such servant threw plaintiff down in removing him.

2. CARRIERS, § 482*—*when instruction that carrier has no right to remove intoxicated passenger erroneous.* In an action of trespass by a passenger to recover for being wrongfully removed from a railroad train on the ground that he was intoxicated, an instruction leaving to the jury the question of gross and slight intoxication, and telling the jury that if plaintiff was not so intoxicated as to be disgusting, disagreeable or annoying to other passengers, or likely to become so, defendant had no right to remove plaintiff from the train, *held* erroneous under section 1 of the Act of 1911 (J. & A. ¶ 8887), providing that it shall be a criminal offense to drink intoxicating liquor or to be intoxicated on any railroad car used for the transportation of passengers, or on or about any railroad station or platform.

3. TRIAL, § 187*—*when question of authority of servant raised on motion for direction of verdict.* In an action of trespass to recover for injury sustained by the wrongful act of one alleged to be a servant of defendant, a motion by defendant for a peremptory instruction in its favor raises the question of the authority of such alleged servant.

4. CARRIERS, § 526*—*when evidence sufficient to show that conductor acted within scope of authority in ejecting person.* In an action of trespass to recover for being wrongfully removed from a railroad train, where it appeared that plaintiff was removed by order of the train conductor by one alleged to have been a servant of defendant, but where there was no direct evidence as to the scope of such person's authority, a finding that such act was within the scope of such servant's authority *held* warranted under the evidence, it appearing that the jury were properly instructed, and that there were facts and circumstances surrounding the case from which the jury might properly so find.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. **TRESPASS, § 45***—*when evidence of justification competent under general issue.* Evidence of justification is competent under a plea of the general issue, though the commencement and ending of the declaration describe the action as trespass, provided the body of the declaration describe an action in the nature of an action on the case.

6. **TRESPASS, § 45***—*when evidence in mitigation of damages admissible under general issue.* Evidence in mitigation of damages is competent under a plea of the general issue although the commencement and ending of the declaration describe the action as trespass, provided the body of the declaration describe an action in the nature of an action on the case.

7. **PLEADING, § 38***—*what part of declaration controls its character.* The body of a declaration and not its commencement and ending will control its character.

Appeal from the Circuit Court of St. Clair county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

KRAMER, KRAMER & CAMPBELL and R. H. WIECHERT, for appellant; JOHN G. DRENNAN, of counsel.

JAMES O. MILLER, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

This is an action brought by William George, appellee, against the Illinois Central Railroad Company, appellant, to recover damages for refusing to allow the appellee to board the appellant's train and for otherwise injuring the appellee. Said cause was tried and a verdict for two hundred and fifty dollars was rendered for appellee. Motions for new trial and in arrest of judgment were overruled by the court and judgment entered, from which judgment this appeal was taken.

The evidence shows that William George, the appellee, was a resident of Winkle, Illinois, a town about twenty or twenty-five miles south of Lenzburg; that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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on December 22, 1913, in company with his wife, he came to Lenzburg to visit his daughter; he spent the day with his daughter and son-in-law, and during the visit drank some whisky. The train from Lenzburg to Winkle was due about six o'clock p. m., and appellee and his wife walked from their daughter's to Lenzburg and arrived there about three quarters of an hour before the train was due. They immediately went to the depot and purchased tickets from Lenzburg to Winkle. At that time appellee was sober, or at least did not show any indications of drunkenness to the persons who saw him. He immediately went across the street to a saloon and remained there until the train whistled for the Lenzburg station, when his wife walked across the street to the saloon and called him. While in the saloon appellee drank two beers and a pony of whisky. On the train in question was a man by the name of Kerr, a watchman for appellant, but whose particular duties, powers and authority are not shown by the record. Appellee got on the second step of the coach when Kerr started to take him off the train. The conductor came up to the point where appellee and Kerr were and asked what was wrong. Kerr replied appellee was drunk, whereupon the conductor said to Kerr not to let him on the train; that he did not want any drunken men on the train. Kerr then lifted appellee off the steps onto the depot platform and led him back from the train ten or twelve feet to a place close to the depot building.

Appellee makes no claim of any injury on account of being taken off the train, except that he claims he was humiliated and prevented from continuing his journey by reason thereof. After the train left Kerr went into the private office of the station agent in the depot building, and appellee, it seems, went into the waiting room of the depot, and claims he did so in order to get a refund on his ticket, but the agent and his assistant both testified that he asked when the next train would

arrive for Winkle. When appellee started towards the door, Kerr came out of the agent's office, and, as he and certain of the witnesses for appellant testified, started to assist appellee to the depot platform, as he was having considerable trouble on account of his intoxicated condition. Certain of the witnesses for appellee testified that when Kerr and appellee reached the outside door of the building Kerr pushed appellee, and that he fell on the depot platform with his feet just inside the doorway.

On the other hand, certain of appellant's witnesses testified that when he got to the doorway he let loose of appellee's arms and that appellee in his intoxicated condition slipped upon the floor and fell. There is a conflict in the evidence at this point.

Kerr did not testify for the reason that between the time of the injury and the time of the trial he had left defendant's employ and returned to the old country.

There was no evidence as to Kerr's agency for the appellant, his authority or the scope of his duty, except that one witness testified that Kerr was a watchman of the appellant, and one witness referred to Kerr as a special agent of the appellant, and said that he had known of his being after some boys who stole from freight rooms at Lenzburg and Marissa. After the occurrence of the events herein stated, appellee returned to the saloon where he spent the night. The next morning he returned to his home in Winkle.

Appellant's most serious contentions for a reversal of this case are, first, that the court erred in giving appellee's fourth and sixth instructions.

The fourth instruction is as follows:

"If a railway conductor orders a special officer to prevent a person who has purchased a ticket, and who is not drunk, from riding as a passenger, upon the assigned reason that said person was drunk, and it should turn out to be untrue that he was drunk, and if the special officer in whose custody he was assigned throws this passenger down, using language

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intended to wound the feelings of the passenger and to bring him into contempt and disgrace, in a suit for trespass against the company the jury may allow exemplary damages."

This instruction should not have been given, as there was no evidence that Kerr or any one else in ejecting appellee from the train threw him down. Appellee, himself, testified that when ejected from the train he was not hurt and other witnesses who saw the occurrence testified to the same effect.

Appellee's sixth instruction is as follows:

"The court instructs the jury that common carriers are not required to receive for passage a drunken person, if such person is intoxicated to such an extent as to render it probable that he would be disgusting, disagreeable, or annoying to other passengers. But slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify the company in refusing to receive and carry him, and if you believe from the evidence in this case that the plaintiff was not drunk, or if you believe from the evidence that he was only slightly intoxicated, then it is a question for you to determine from all of the evidence whether his intoxication, if you find that he was intoxicated, was to such an extent or degree that he likely would be an improper person to carry as a passenger. If you determine from the evidence that he was intoxicated to such a degree that his conduct would be disgusting to other passengers, disagreeable or annoying to them, then the conductor was justified in refusing him passage on the train; if you do not find from the evidence that he was intoxicated to such a degree then you may find for the plaintiff.

"Whether plaintiff was intoxicated at all is a question of fact for you to determine.

"Whether plaintiff was slightly intoxicated is also a question of fact for you to determine."

This instruction should not have been given as it undertakes to submit to the jury the question of gross and slight intoxication. This instruction might have been good prior to the passage of the act (section 1

of Act of 1911, J. & A. ¶ 8887) which relates to persons being intoxicated upon a railway train or on a depot platform or in a depot building, but since the passage of the statute in question, there can be no doubt that this instruction does not state the law. The evidence in this case tended to show that appellee was staggering and reeling, and had to be assisted upon the train, but there is no evidence that he was disagreeable or annoying. If this instruction states the law correctly, then a railway company cannot refuse admission to a passenger, no matter how intoxicated he is, unless he is disgusting, disagreeable or annoying, or likely to become so.

The second contention of appellant is that the court erred in refusing its peremptory instructions to the jury to find the issues for the appellant. By this assignment of error, appellant raises the question whether or not it is liable for the alleged injury claimed to have been suffered by him at the depot building, without further evidence showing the authority of the man Kerr. While there is no direct evidence as to the scope of Kerr's authority, still we are unable to say that from all the facts and circumstances surrounding the case a jury would not be warranted in finding, under the guidance of proper instructions, the scope of Kerr's authority to be sufficient to bind the defendant in this case. The court, therefore, did not err in refusing appellant's peremptory instructions.

It is contended by appellee that the declaration is "in trespass," and that, therefore, evidence in justification and mitigation of damages are not admissible under the plea of the general issue filed by appellant in this case. In reply to this contention, it may be said, that plaintiff's declaration, except in its commencement and ending, is in the nature of an action on the case, and, under the authorities, the body of the declaration, being in case, would control its character. There was a conflict of evidence as to what took place in the depot, and as this case is to be submitted to

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another jury we will not express any opinion in regard to the weight of the evidence.

For the errors above indicated this cause will be reversed and remanded.

Reversed and remanded.

Peter Baker et al., Appellees, v. Charles I. Pierce, Appellant.

1. EQUITY, § 285*—*when allegations and proof must correspond.* In equity pleading, the allegations of the bill, the evidence and the decree must correspond.

2. REFORMATION OF INSTRUMENTS, § 47*—*when evidence sufficient to show award complies with intent of arbitrators.* In a bill to reform and correct the award of arbitrators and alleging that owing to a mistake of the scrivener the award did not express the true intent of the arbitrators, evidence held to show that the award correctly expressed the intent of the arbitrators.

3. ARBITRATION AND AWARD, § 75*—*when equity will not relieve against error of law.* No relief can be granted in equity for a mistake of law by arbitrators in misunderstanding the legal scope and effect of an award made by such arbitrators.

4. REFORMATION OF INSTRUMENTS, § 11*—*what does not constitute mutual mistake.* The execution of a written instrument representing the intention and understanding of the parties at the time of execution, with full knowledge of the facts, will negative a claim of mutual mistake and will operate to defeat a bill to reform on that ground, it being not a question of what parties would have intended had they been better informed, but of what they intended as they were informed.

5. REFORMATION OF INSTRUMENTS, § 12*—*what necessary to reform instrument on ground of mistake.* In order to justify the reformation of a written instrument on the ground of mistake it is necessary, first, that the mistake be of fact and not of law; second, that the mistake be proved by clear and convincing evidence; and third, that the mistake be mutual and common to both parties.

6. WORDS AND PHRASES, —*mistake of law.* A mistake of law is an erroneous conclusion as to the legal effect of known facts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. **CONTRACTS, § 205***—*when construction of for court.* The construction of words in an instrument is a matter of law.

8. **EQUITY, § 18***—*when parties not relieved because of mistake of law.* If the words of an instrument are written as intended by the parties, or as they supposed the words were written, when executing the instrument, no relief can be had either at law or in equity, no matter how much the parties may have mistaken the legal effect of the words used.

9. **CONTRACTS, § 205***—*when insertion of words for jury.* The insertion of words in a written instrument is a question of fact.

10. **REFORMATION OF INSTRUMENTS, § 11***—*when written instrument may be reformed.* A written instrument can be reformed only for mistakes of fact.

11. **REFORMATION OF INSTRUMENTS, § 2***—*applicability of rules to awards of arbitrators.* The rules applicable to the reformation of written instruments apply to the awards of arbitrators.

12. **ARBITRATION AND AWARD, § 52***—*what is nature of award.* The awards of arbitrators partake of the character of the findings and judgment of a court, the parties to the arbitration in effect agreeing to submit their case to the arbitrators both on the facts and on the law.

13. **ARBITRATION AND AWARD, § 53***—*when finding and award of arbitrators conclusive.* There is no appeal from the finding and award of arbitrators if the proceedings before them are regular.

14. **ARBITRATION AND AWARD, § 50***—*when awards may not be corrected.* Awards made by arbitrators cannot be corrected for errors of law.

15. **ARBITRATION AND AWARD, § 64***—*when party to arbitration agreement estopped to claim invalidity of agreement.* In a bill to reform the award of arbitrators on the ground of mistake, where it appeared that some of the parties to the arbitration did not sign the agreement to submit the cause to the arbitrators, *held* that defendant was estopped to claim that the agreement was void on that ground, it appearing that defendant stipulated at the hearing that if such other parties were present they would testify that they had authorized complainant to enter into the agreement on their behalf.

16. **ARBITRATION AND AWARD, § 36***—*when award void.* An award of arbitrators which is not as broad as the submission is void.

17. **ARBITRATION AND AWARD, § 51***—*when decree reforming award erroneous.* In a bill to reform an award of arbitrators on the ground of mistake, where the evidence showed that the award sought to be reformed was as intended by the arbitrators, a decree reforming the award *held* erroneous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appeal from the Circuit Court of Saline county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed December 1, 1915.

WARREN NICHOLS and WHITLEY & COMBE, for appellant.

CLARK & HUTTON and W. F. SCOTT, for appellees.

MR. JUSTICE BOGGS delivered the opinion of the court.

This was an action brought by Peter Baker, Charles Baker and W. A. Grant, appellees, complainants below, against Charles I. Pierce, appellant, defendant below, by bill in chancery to reform an award of arbitration.

A difference had arisen, it seems, between appellees and appellant in relation to certain option contracts. On or about the 21st day of March, 1913, a contract was entered into signed by W. A. Grant, one of said appellees, who purported to act also for said Peter Baker and Charles Baker, and by appellant for the submission of said differences to arbitration. The arbitrators were selected and on May 26, 1913, made their award, the terms of which are as follows: "We, the undersigned commissioners appointed by C. I. Pierce and W. A. Grant, as a board of arbitration to adjust the differences set forth in the agreement hereto attached, after hearing all the evidence and examining the exhibits, is of the opinion that C. I. Pierce alone is responsible, in that he did not carry out the provisions of the contract entered into with W. A. Grant, therefore, we do hereby award to W. A. Grant the sum of Five Thousand Five Hundred Dollars as a just and equitable sum in full settlement of all things submitted to the board under the said agreement.

"Said sum of Five Thousand Five Hundred Dollars to be paid to W. A. Grant by C. I. Pierce within ten days from the date hereof.

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“Dated at Harrisburg, Illinois, this 26th day of May, 1913.

WM. JOHNSON,
JNO. B. LEE,
A. W. LEWIS.”

As will be seen, nothing was said in the award in relation to the Bakers, but the award ran in the name of appellee W. A. Grant alone. It is the contention of appellees that said award, while made in the name of appellee W. A. Grant, was intended as an award to all of appellees, and that such award should be so corrected as to carry out such intention. The bill filed by appellees set out said agreement for a submission to arbitration and the award of said arbitrators and alleged that said award so made by said arbitrators did not, on account of an error of the scrivener, correctly set forth their findings and prayed that the same be corrected and reformed.

The answer of appellant denied the right of appellees to have said award reformed and averred that said award correctly set forth the findings of said arbitrators. The evidence was taken by a special master and reported to the court and on hearing the trial court found the issues for appellees, complainants below, and a decree was entered reforming and correcting said award as prayed. From said decree this appeal is prosecuted.

Appellees in their bill of complaint base their right to relief on the ground that the scrivener who prepared the draft of said award, by mistake, failed to express the true intention of said arbitrators. The allegations of the bill are that the award “as prepared by the scrivener on account of said mistake did not express the true intention of the arbitrators,” and the bill prays “that said error or mistake may be corrected and the said writing reformed so as to truly express and describe the intention of said arbitrators.”

It is a fundamental rule of equity pleading that the allegations of a bill, the proof and decree must cor-

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respond. In other words, relief can only be granted on a sufficient bill supported by competent evidence. *McKay v. Bissett*, 10 Ill. (5 Gilm.) 499; *Morgan v. Smith*, 11 Ill. 194; *Russell v. Conners*, 140 Ill. 660; *Leahy v. Nolan*, 261 Ill. 219.

In the latter case the court in its opinion says: "It is the rule of courts of equity that allegations and proofs must correspond, and in order to grant the relief prayed for in a bill the court must be able to find that the facts alleged therein are true."

Do the evidence, facts and circumstances in the case support the allegations of appellees' bill, and the decree of the trial court? The only witnesses who testify in regard to the award and its contents are the three arbitrators, and it is impossible for us after a careful reading and consideration of their testimony to see how it in any way goes in support of the allegations of appellees' bill. Instead of the testimony of said arbitrators tending to show that the award did not contain the terms and conditions agreed on and determined by them, it shows exactly to the contrary, and that the arbitrators and each of them fully knew and understood its terms and conditions and carefully read and considered the same before signing. John B. Lee, the arbitrator selected by W. A. Grant, says, in answer to the question, "You may examine the paper I show you marked Complainants' Exhibit 'A' (the award) and state whether or not that was the finding as reduced to writing? 'Yes, sir, the agreed finding of the Board.'

"Q. In whose favor was it the intention of the Board to find? In favor of what individual? 'A.' It was the intention to find in favor of Mr. Grant, Mr. W. A. Grant."

On cross-examination, the same witness said: "Q. Who prepared this document here marked Complainants' exhibit 'A.' who prepared that? A. Judge Lewis, Will Johnson and myself.

"Q. Was it penciled out before you signed it?
A. Yes, sir.

"Q. And thoroughly discussed? A. Yes, sir, that is my understanding?

"Q. Didn't this writing express every intention you had in that regard? A. Every bit of it as far as I know.

"Q. And you agreed on every word and character and syllable in this exhibit? A. We changed it, one of us I think, possibly all of us had something to say about the change and afterward agreed on the drafted copy.

"Q. And you went in the front room and wrote it as you agreed on? A. Yes, sir.

"Q. And this expresses the intention of the three of you don't it? A. I think so.

"Q. There is no mistake about any part of it as far as your intention at the time is concerned? A. I don't think there is any mistake about it, we wrote it just as we intended to write it.

"Q. Did you read it before you signed it? A. Yes, sir."

William Johnson, the arbitrator selected by appellant Charles I. Pierce, says, in answer to the question, "So far as this writing is concerned this Exhibit 'A' signed by you and Mr. Lee and Judge Lewis, is there any mistake about that in any way? A. No, no mistake.

"Q. Expressed it just exactly as you intended it? A. Yes, sir, the document is brief and that was one thing we had in mind, not to make our allotment too long and convey the meaning we wanted it to convey.

"Q. It does convey the meaning you intended it to convey does it not? A. Yes, sir."

Judge Lewis testified, in answer to the question, "I will ask you if at the time you signed it (the award) you understood its contents? A. I understood the words. I can't say I understood the legal construction of it, I thought I did.

"Q. You knew exactly what it said at the time you signed it? A. I knew the words in it."

A great many more questions of a similar character were asked said witness to which similar answers were given. From this testimony it clearly appears that each and all of the said arbitrators knew and fully understood the terms and conditions of said award. The most that can be said is that they may not all have understood its legal scope and effect. In other words, there may have been an error of law made by said arbitrators, but certainly not an error or mistake of fact.

The bill charges an error or mistake of fact in the drafting of said award, but does not charge an error or mistake of law on the part of said arbitrators, but if it had, the allegation would not have been good, as no relief can be granted in equity therefor.

The rule as laid down in Cyc., vol. 34, at page 947, is as follows. "Where an instrument is executed according to the intention and understanding of the parties at the time of execution, and with full knowledge of the facts, such knowledge and execution will operate to defeat an action to reform in that it negatives mutual mistake. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."

The Supreme Court of the State in passing on this question in the case of *Purvines v. Harrison*, 151 Ill., page 223 says: "To justify the reformation of a written instrument upon the ground of mistake, it is necessary, first, that the mistake should be one of fact and not of law (*Sibert v. McAvoy*, 15 Ill. 106); second, that the mistake should be proved by clear and convincing evidence (2 Pom. Eq. Jur., sec. 682); third, that the mistake should be mutual and common to both parties to the instrument. (*Sutherland v. Sutherland*, 69 Ill. 481.) A mistake of law is an erroneous conclusion as to the legal effect of known facts. (*Hurd v. Hall*, 12

Wis. 113.) The construction of words is a matter of law. (*Sibert v. McAvoy, supra.*) Where parties instructed an officer to prepare a quitclaim deed for their execution, but he drew a deed containing language which amounted in law to a covenant of title in fee, and they signed the deed knowing that such language was in it, they were held to have been mistaken in the law, that is to say, in the legal effect of the language used and in the legal consequences of retaining such language in the deed. (*Gordere v. Downing*, 18 Ill. 492.)”

In *Seymour v. Bowles*, 172 Ill. 521, on page 524, the court uses this language: “The allegation in the bill that in drafting the deed the word ‘heirs’ was mistakenly used for ‘children’ presents no case for the correction of a mistake on reformation of the deed. The alleged mistake is one of law, and cannot be corrected.”

In *Sibert v. McAvoy*, 15 Ill. 106, our Supreme Court says: “If the words are written as the parties intended they should be written, or supposed they were written, when they signed the contract, no matter how much they may be mistaken as to the meaning of those words, no relief can be granted, either at law or in equity. The construction of words is a matter of law. The insertion of words is a matter of fact. It is for mistakes of fact, alone, that contracts may be reformed.” To the same effect is *Wood v. Price*, 46 Ill. 439, and *Bonney v. Stoughton*, 122 Ill. 536.

While these cases are cases where the Supreme Court had under consideration contracts, or instruments of that character, still we think the same rules as there laid down should apply to awards of arbitrators.

Awards of this kind partake of the character of the finding and judgment of a court. The parties in effect submit to the arbitrators their case both as to the facts and the law, and if the proceedings of the arbitrators are regular there is no appeal from their finding and award. This being true, it could hardly be contended

that an award could any more be reformed and corrected for errors of law made by the arbitrators than that a decree of a court of equity could be reformed after the term had closed, because the chancellor who rendered the same did so under a misapprehension of its legal effect and meaning.

Appellant also urges as a reason why this cause should be reversed, that the agreement to submit to arbitrators is void because it was not signed by the Bakers, but we are inclined to hold that he is estopped from urging this objection on account of the stipulation made on the hearing, to the effect that if the Bakers were present they would testify that they authorized W. A. Grant to enter into said agreement on their behalf.

It is also urged by appellant that the award made by the arbitrators is void because it does not dispose of all matters of difference submitted to them by said agreement. In other words, that the award is not as broad as the submission. If this be true, then under the holdings of the Supreme and Appellate Courts of this State it would be void. *Taylor v. Scott, Foreman & Co.*, 178 Ill. App. 487; *Alfred v. Kankakee & S. W. R. Co.*, 92 Ill. 609.

In view, however, of what we have said, it is not necessary for us to pass on this point, and inasmuch as the record discloses that suit was instituted on said award we do not think we should express any opinion touching its validity.

For the reasons assigned we think the trial court erred in rendering a decree reforming said award. The judgment must, therefore, be reversed and the cause remanded with direction to dismiss said bill for want of equity.

Reversed and remanded with directions.

John Henry, Appellee, v. Charles Britt, Appellant.
(Not to be reported in full.)

Appeal from the Circuit Court of Pulaski county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed December 1, 1915.

Statement of the Case.

Bill by John Henry, complainant, against Charles Britt, defendant, in the Circuit Court of Pulaski county, to compel defendant to convey to complainant certain premises pursuant to a verbal contract between one Grant Britt, deceased, father of defendant, and complainant. From a decree granting the relief prayed, defendant appeals.

At the hearing defendant disputed only whether complainant had repaid the advances made to him by Grant Britt, and whether the verbal agreement between complainant and Grant Britt was within the Statute of Frauds.

The bill alleged that on August 1, 1904, J. B. Mathis, the owner of the Southwest Quarter of the Southeast Quarter of Section 29, in Township 14 South, Range 1 West of the Third Principal Meridian, in Pulaski County, made and delivered to the complainant a bond, also signed by his wife, Nellie I. Mathis, conditioned for the conveyance of the described tract of land to the complainant for the sum of \$850, payable \$175 cash in hand, and the remainder in annual payments of \$135 cash, with interest at seven per cent. Complainant made the cash payment and took possession and has ever since been in possession. On May 1, 1905, J. B. Mathis and wife executed a quitclaim deed of the premises to A. W. Brown, subject to the conditions of the bond, which were assumed by

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Brown. In the year 1906, the complainant made an agreement with Grant Britt, by which Britt agreed to pay to Brown the amount remaining due and unpaid by the terms of the bond, and upon complainant repaying the amount so paid, to convey the premises to the complainant. In pursuance of said agreement, the complainant assigned to Grant Britt the bond for a deed. On October 25, 1906, Brown died, and afterwards the defendant Margaret A. Brown was appointed executrix of his will. On December 14, 1906, Grant Britt died, leaving the defendant Charles Britt, a minor, his son and only heir at law. On October 15, 1907, Margaret A. Brown, as executrix, conveyed the premises to Charles Britt. On October 19, 1908, H. M. Britt was appointed guardian of Charles Britt. The complainant paid to H. M. Britt, as guardian, the remainder of the purchase money due. When the bill was filed the defendant Burton Bagby was guardian of Charles Britt, and the complainant had demanded the execution of a deed, which was refused. The defendant Margaret A. Brown, executrix, by her answer admitted the making of the conveyance to A. W. Brown, subject to the bond for a deed, his death, and the conveyance by her, as executrix, to Charles Britt. The defendants Charles Britt and Burton Bagby, his guardian, answered that they were not informed as to the alleged purchase by the complainant from J. B. Mathis, or the payment of \$175, or of the deed from Mathis and wife to Brown. They did not deny the averments of the bill respecting the agreement between the complainant and Grant Britt, and made no answer to such averments, but denied that complainant had performed or had paid any sum to either of them, or on behalf of either of them, on the purchase price of the land, or that he had paid any taxes or assessments. They alleged that the only thing that the complainant ever gave them was a few loads of corn paid as rent, and they invoked the Statute of Frauds and Perjuries

as against the agreement between the complainant and Grant Britt.

Complainant testified:

“I paid \$300 to H. M. Britt. I paid him \$300. Every dollar is here on this stick (presenting stick) every notch on this stick is \$1.00.

Q. Where did you get that money?

A. I raised strawberries, peas and beans and shipped them.

Q. Did you pay him \$300 at one time?

A. No, sir. Every time I paid him \$10 I would cut ten notches on this stick. Every notch here is a dollar.

Q. When did you put these notches there?

A. Every time I made a payment.”

It was sought to corroborate the testimony of complainant with reference to this payment by his sons, Fred Henry and John Henry, Jr., and his daughter Margaret Henry. Fred Henry testified that he gave his father \$110, and that his sister Margaret gave her father \$170, and that their father had \$20, making in all \$300, and that he took this \$300 and paid it to H. M. Britt on the land. The testimony of Margaret was practically to the same effect. However, neither of them testified at being present and seeing the money paid to Britt, but simply that they gave their father the money and that he was going to make the payment to Britt, and that he brought back with him a slip of paper which they called a receipt. This paper was in words and figures as follows: “John Henry to H. M. Britt, \$300.00.” John Henry, Jr., who was fourteen years old when he testified, said that he was with his father when his father delivered some money to H. M. Britt, and he saw them pour the money out on the table and count it, but he did not know how much there was, or for what purpose it was delivered to Britt. Witness was ten years of age at the time the money was alleged to have been paid.

It also appeared that at the time of the death of Grant Britt, complainant was largely indebted to Britt

for different sums of money secured by chattel mortgages, which mortgages came to the possession of H. M. Britt, as administrator of the Grant Britt estate; that they had various transactions with reference to these chattel mortgages, the same being from time to time renewed, and, in fact, the evidence showed that at least one of them was still unpaid.

Complainant on his cross-examination with reference to these chattel mortgages was asked these questions: "Q. Was it after Grant Britt's death you made this chattel mortgage? Do you remember being before Mr. Curt to take the acknowledgment, do you remember that? A. He told me at that time that I did not owe but \$300.00."

H. M. Britt, administrator of the estate of Grant Britt, deceased, and for a time guardian of Charles Britt, testified in effect that at no time, after the death of Grant Britt, did complainant make him any payments of any kind whatever on this bond for a deed. Charles Britt testified that at no time did complainant pay him anything on said land.

The chancellor found the facts to be as alleged in the bill and that defendant had attained his majority. The chancellor then stated an account charging complainant with principal, interest and taxes in the sum of \$1,099.90, and credits him as follows: Amount paid to Grant Britt \$181; interest on same, seven per cent. from date of payment to date of decree, \$76.02; and with \$300 paid to H. M. Britt, guardian of Charles Britt, with interest on the same from the date of payment to wit: May 30, 1909, to the date of the decree, \$93; and also credited him with forty-three loads of corn at eighteen bushels per load, at fifty cents per bushel, \$387; with interest on same, \$27.09, making a total credit of \$1,064.11, leaving a balance owing by appellee to appellant of \$35.79.

The chancellor then decreed that on payment of such balance defendant should execute and deliver a deed of

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the premises to complainant, or in default of such conveyance a special master in chancery, appointed for the purpose, should execute the deed in defendant's behalf.

C. S. MILLER and L. M. BRADLEY, for appellant.

CHARLES L. RICE, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

Abstract of the Decision.

1. MORTGAGES, § 12*—*when assigned bond for deed constitutes mortgage.* An assignment of a bond for a deed to land on the understanding that the assignee shall take the deed and hold the same as security for the repayment by assignor of advances of money to pay the amount due on the bond and the amount of taxes to be paid by the assignee amounts to a mortgage, and the deed so taken will stand as security for the money so advanced.

2. MORTGAGES, § 716*—*when bill to compel conveyance of land bill to redeem.* Where the evidence shows that defendant's predecessor in title to land took title under a verbal agreement to convey to complainant on payment of certain sums of money, a bill to compel such a conveyance is a bill to redeem and not a bill for specific performance.

3. FRAUD, STATUTE OF, § 28*—*when inapplicable to verbal agreement to convey land.* The Statute of Frauds has no application to a case where one takes title to land under verbal agreement to convey to another on payment of certain sums of money, such transaction being a mortgage, and not an agreement for the sale of land.

4. MORTGAGES, § 720*—*when oral testimony of agreement to reconvey land admissible.* In a bill to compel conveyance of land, alleging that the predecessor of defendant in title to certain land took title on a verbal agreement to convey to complainant on payment of certain sums of money, oral testimony of the agreement to reconvey is competent.

5. MORTGAGES, § 12*—*when evidence sufficient to sustain finding that bond for deed assigned as security for money advanced.* In a bill to compel the conveyance of land alleging that complainant, having a bond for a deed of the land in question, assigned the bond

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to defendant's predecessor in title thereto under a verbal agreement that such predecessor would advance the sums due on the bond, and the sums necessary to pay the taxes on the land, and would convey to complainant on payment of the sums so advanced, evidence *held* to sustain a finding that complainant assigned his bond to such predecessor as security for the money advanced.

6. APPEAL AND ERROR, § 1410*—*when finding set aside on appeal.* A finding will be set aside on appeal where it is against the manifest weight of the evidence.

7. MORTGAGES, § 720*—*when evidence insufficient to sustain decree stating an account.* In a bill to compel the conveyance of land, where it appeared that defendant's predecessor in title to the land took title under an agreement to convey to complainant, on payment of certain sums of money, a decree stating an account showing the amount due from complainant and the amount paid by him, *held* sustained by the evidence except as to one item.

8. PAYMENT, § 29*—*when evidence insufficient to establish payment.* In a bill to compel the conveyance of land, where it appeared that defendant's predecessor in title to the land took title under an agreement to convey to complainant, on payment of certain sums, a decree allowing in its statement of account a payment of \$300 by complainant, *held* manifestly against the weight of the evidence, such finding being made on the uncorroborated testimony of complainant, which was contradicted by defendant's evidence and impeached by evidence tending to show that complainant's reputation for truth and veracity was bad in the community where he resided.

9. PAYMENT, § 29*—*when purported receipt entitled to little weight as evidence of payment.* In a bill to compel the conveyance of land, where it appeared that defendant's predecessor in title to the land had taken title under an agreement to convey to complainant, on payment of certain sums of money, and where the payment of an item of \$300 to the administrator of such predecessor was disputed, a paper reading: "John Henry to H. M. Britt, \$300.00," *held* not a receipt and entitled to little weight, the paper being not signed, and there being no evidence of handwriting, or to show how complainant came by the paper other than his own testimony, and there being evidence that complainant owed H. M. Britt \$300 on another transaction at the time when the payment was alleged to have been made, to which the paper might have referred.

10. PAYMENT, § 27*—*who has burden of proving payment.* One claiming to have made a payment has the burden of proving the payment by a preponderance of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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11. MORTGAGES, § 720*—*when evidence sufficient to sustain finding that corn paid on indebtedness for land.* In a bill to compel the conveyance of land, where it appeared that defendant's predecessor in title to the land had taken title under an agreement to convey to complainant, on payment of certain sums of money, a finding that certain corn was paid on account of the sums due defendant's predecessor and not as rent, *held* sustained by the evidence.

Mrs. Ida Keirse y, Appellant, v. Dr. George R. McNeemer, Appellee.

1. LIMITATION OF ACTIONS, § 10*—*when declaration examined to determine which of two statutes applies.* In an action against a physician to recover for injury sustained by alleged unskilful treatment of plaintiff by defendant, the question as to what statute of limitation applies, whether Hurd's Rev. St., ch. 83, sec. 14 (J. & A. ¶ 7209), providing that actions, *inter alia*, for an injury to the person shall be commenced within two years next after the cause of action accrues, or section 15 of the same chapter (J. & A. ¶ 7210), providing that actions, *inter alia*, on unwritten contracts, expressed or implied, shall be commenced within five years of such time, is to be determined from an examination of the declaration, to see whether plaintiff sues for breach of contract or in tort for injuries without reference to the contract.

2. PHYSICIANS AND SURGEONS, § 18b*—*when declaration states cause of action for negligent and unskilful treatment.* In an action against a physician to recover for injury sustained by alleged unskilful treatment of plaintiff by defendant, a declaration alleging that defendant "so unskilfully and negligently conducted himself in that behalf, that by and through his want of skill and care and neglect" plaintiff's sickness was aggravated, causing the injury sought to be recovered for, *held* to state a cause of action for negligent and unskilful treatment by defendant, without relying on contract other than that implied by the law obliging physicians to use reasonable care and skill in treatment without reference to contract of hiring.

3. PHYSICIANS AND SURGEONS, § 17*—*what is nature of action.* Actions against physicians for malpractice and for negligent and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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unskillful treatment fall within the class of actions for personal injuries.

4. LIMITATION OF ACTIONS, § 4*—*how statute construed*. The words "all other civil actions not otherwise provided for" in Hurd's Rev. St., ch. 83, sec. 14 (J. & A. ¶ 7209), providing that certain actions be commenced within five years next after the cause of action accrues, include only actions *ejusdem generis* with "contracts expressed or implied, or on awards of arbitration, or for the recovery of damages done to property real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof," being the actions specifically included within the operation of the section.

5. LIMITATION OF ACTIONS, § 4*—*how statute construed relative to action against physician for negligent injuries*. An action against a physician to recover for injuries sustained as a result of unskillful and negligent treatment of plaintiff by defendant is not *ejusdem generis* with actions on "contracts expressed or implied," or on "awards of arbitration," or "for the recovery of damages done to property, real or personal," or "to recover the possession of personal property or damages for the detention or conversion thereof."

6. PHYSICIANS AND SURGEONS, § 18b*—*when demurrer to plea of statute of limitations properly overruled*. In an action against a physician to recover for injuries sustained as a result of alleged "want of skill and care and neglect" by defendant in treating plaintiff, a demurrer to a plea of Hurd's Rev. St., ch. 83, sec. 15 (J. & A. ¶ 7210), providing that actions, *inter alia*, for injury to the person shall be commenced within two years next after the cause of action accrues, held correctly overruled, and judgment thereon correctly entered.

McBRIDE, J., dissenting.

Appeal from the Circuit Court of Alexander county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

THOMAS H. SHERIDAN, for appellant.

REED GREEN, for appellee; ROBERT J. FOLONIE, of counsel.

MR. JUSTICE BOGGS delivered the opinion of the court.

This is an action on the case, brought by appellant, plaintiff below, against appellee, defendant below, a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

physician and surgeon, to recover damages for failure to exercise ordinary skill and care as such in treating said plaintiff.

The only question involved in this case is whether or not actions of this character are barred by the Two-Year, or the Five-Year, Statute of Limitations.

The injury complained of occurred on or about the 20th day of May, 1910, more than two years prior to the bringing of said suit, which was instituted on the 30th day of January, 1913.

The declaration, omitting the formal part, is as follows: "Whereas, the defendant, before and at the time of committing the grievances hereinafter mentioned in the county aforesaid, was exercising the profession of a physician and surgeon, and the plaintiff, on May 20, 1910, and while the defendant was so exercising such profession, there retained and employed the defendant, as such physician and surgeon, for reward to attend and treat plaintiff for the cure of the plaintiff of a certain sickness and malady under which she was then and there suffering; and thereupon the defendant, as such physician and surgeon, then and there accepted such retainer and employment, and entered upon the treatment of the plaintiff in pursuance thereof, and continued such treatment for the space of four months. Yet, the defendant, not regarding his duty as such physician and surgeon, during that time there so unskillfully and negligently conducted himself in that behalf, that by and through his want of skill and care and neglect, the said sickness and malady of the plaintiff then and there became greatly increased and aggravated, and the plaintiff then and there underwent great and unnecessary anguish and distress, and became crippled for life and thereby permanently injured, and became and was greatly disordered, reduced and weakened in body and so remained for a long time, to-wit: hitherto, during all such time the plaintiff suffered great pain, and was hindered and prevented

from transacting her affairs and business; and also by means of the premises, the plaintiff has been obliged to pay, and has paid to divers other physicians and surgeons, divers sums of money amounting to \$500.00, in and about endeavoring to be cured of her said sickness, malady and disorder; to the damage of the plaintiff of \$5,000.00, etc.”

To which declaration the defendant entered a plea of not guilty and a plea setting up the Two-Year Statute of Limitations. To this latter plea the plaintiff filed a general demurrer which was overruled by the trial court, and, the plaintiff having elected to stand by her said demurrer, judgment was entered in bar of action and for costs.

It is insisted by appellant that said cause of action does not come under section 14, chapter 83 of Hurd's Revised Statutes (J. & A. ¶ 7209), but that it is governed by section 15 of said chapter (J. & A. ¶ 7210).

Said section 14 is as follows: “Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued.”

Section 15 provides that: “Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.”

In order to determine which of said sections are applicable, it will be necessary to examine the declaration and determine from it whether or not the plaintiff is suing for an alleged breach of the contract, or whether she is suing in tort to recover for alleged injuries sustained by her without reference to contract.

An examination of the declaration discloses that the plaintiff is endeavoring to recover for injuries resulting from the alleged negligent and unskilful treatment accorded her, without relying on any contract, other than the contract which the law implies and which obliges a physician to use reasonable care and skill in the treatment of patients without reference to any contract of hiring.

The declaration charges that on account of the unskilful and negligent conduct and treatment, the malady of the plaintiff was greatly increased and aggravated and she became crippled for life and permanently injured, and was hindered and prevented thereby from transacting her affairs and business and was also obliged to pay out large sums of money to other physicians and surgeons in endeavoring to be treated and cured for said injuries.

Our Supreme Court, it seems, has not passed on this question, but we find a case very similar to this in the Appellate Court for the First District, being the case of *McKee v. Allen*, reported in 94 Appellate, page 147. Quoting from page 155 the court says: "This suit was begun May 15, 1898. But the summons then taken out was not put in the hands of the sheriff, nor was the declaration filed until January 9, 1899. The operation complained of was performed December 15, 1896, and it is contended that the *alias* summons, which was served on defendant, was not issued, nor was the declaration filed until a month and seven days after the bar of the statute had arisen. The argument is that the mere filing of the *precipe* and issue of a summons not placed in the hands of the sheriff 'is not such a commencement of the action as to arrest the bar of the statute.'

"If the suit was not begun until the second summons was issued and the declaration filed, then more than two years had elapsed since the cause of action arose."

This case by implication holds that this character

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of case is barred if not brought within two years of the time the cause of action accrues. We think, too, that it will be found upon investigation that actions for malpractice and cases of this character have always been held to fall within the personal injury class as far back as Blackstone.

In volume 3, at page 122, Blackstone's Commentaries, among the class of injuries designated as injuries to the person, we find the following: "Injuries affecting a man's health or where by an unwholesome practice of another a man sustains an apparent damage in his vigor or constitution as * * * by neglect or unskilled management of his physician, surgeon or apothecary."

Section 15 of our statute on limitations nowhere provides anything with reference to cases of this character, unless it be held that they fall under the provision, "all other civil actions not otherwise provided for." However, we are of the opinion that under the doctrine of *ejusdem generis* that that provision would be held to apply only to contracts of the character particularly enumerated in said section, to wit: "Contracts, expressed or implied, or on awards of arbitration, or for the recovery of damages done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof," none of which said causes of action are in any wise similar to the action at bar.

On the other hand, we think that this action, being a tort action, easily falls under the head of actions for injury to the person as set forth in section 14, the sole basis of the recovery sought in this case being for injuries to the plaintiff caused by the alleged negligent conduct and treatment of the defendant, and for the damage that has accrued to her on account of money she had to expend in endeavoring to be healed of the injury which she claims resulted to her by reason of such negligent treatment.

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If we are correct in this conclusion, the action of the lower court in overruling the demurrer and entering judgment was correct, and the judgment should be and is hereby affirmed.

Affirmed.

MR. JUSTICE MCBRIDE dissents.

George W. Moyers, Appellee, v. Illinois Central Railroad Company, Appellant.

1. CARRIERS, § 247*—*when burden of proof on carrier attempting to avoid common-law liability.* In order to relieve a carrier of its common-law liability for injury to live stock, it has the burden of showing that the shipper accepted the written contract of shipment imposing limitations on its liability, knew the contents thereof, and assented to its terms.

2. ACTION ON THE CASE, § 12*—*when evidence in controversion of matters embodied in special pleas admissible.* Since under the plea of not guilty in an action on the case, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration but may also give in evidence any matter in justification or excuse, evidence in controversion of such matters embodied in special pleas is admissible, though no replication by way of confession and avoidance thereof be filed.

3. APPEAL AND ERROR, § 1456*—*when no reversal for irregular introduction of evidence under improper pleadings.* Mere irregularity in the introduction of evidence under improper pleadings will not work a reversal of a case where no injustice has been done.

4. APPEAL AND ERROR, § 420*—*when objection raised on appeal not considered.* An objection raised for the first time on appeal that no replication was filed to special pleas on file in the court below will not be considered.

5. CARRIERS, § 239*—*when cannot limit liability for negligence.* A common carrier cannot limit its liability for negligence in the transportation of live stock.

6. APPEAL AND ERROR, § 1410*—*when finding of jury reversed.* It being the province of the jury to determine what acts do or do

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not constitute negligence, a court of appeal will be slow to reverse their finding unless so manifestly against the evidence as to require it.

7. APPEAL AND ERROR, § 1258*—*when defendant cannot complain that damages are inadequate.* The defendant cannot complain that a judgment was for too small an amount.

Appeal from the Circuit Court of Pope county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

CHARLES DUFEE, for appellant; BLEWETT LEE and W. W. BARR, of counsel.

JOHN W. BROWNING, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The appellee recovered a judgment against the appellant in the Circuit Court of Pope county for three hundred dollars, which appellant seeks to reverse. Appellee, of Golconda, Illinois, purchased of A. F. Hayes of Marissa, Illinois, a jack, and Hayes was to load the jack and cause it to be shipped to appellee, and on April 1, 1913, he loaded the animal into a car on appellant's road at Marissa for transportation. The jack was carried to Carbondale on the 1st day of April and from there to Reevesville, on the 2nd day of April, arriving there in the afternoon but owing to the excessive floods at this time traffic was suspended between this place and Golconda, and no trains were operated from April 2nd to April 10th, and owing to the condition of the floods the agent of appellant at Reevesville unloaded the jack and cared for him until the waters had receded so that trains could be run. On April 10th traffic was again resumed, and the agent caused the jack to be loaded upon the car and in doing so he was assisted by a man by the name of Estes. They led the jack into the stock pens and from there

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

led him up into the stock chute, which is used for loading animals out of the pens into the cars, and there tied him with a rope of the size of one-half to one inch, and wrapped the rope around a post which is described as being sharp on the edge, and at this time the car had not been set so that the jack could pass from the chute into the car, and as they were switching the engine and cars about for the purpose of getting a car in place the jack in some way became frightened, broke the rope and jumped out of the chute at the end next to the track, which is up a distance of three or four feet from the ground, and in doing so the animal was injured, so much so that it afterwards died. There was nothing placed across the end of the chute to keep the jack from jumping out. The only thing, as witness says, was the rope that he was tied with, and the two men who attempted to keep him back. It was afterwards caught, the car put in position at the chute and the jack was led from the chute into the car and shipped to Golconda. It was noticed at the time the jack was unloaded from the car that he was lame, and he gradually grew worse and died on the 10th day of July, 1913. His knee was much enlarged and he was feverish and out of condition until he died. It was testified that the jack was worth four hundred dollars. Shortly after the jack was received at Golconda, the appellee made application to the agent to put in a bill for damages but the agent on being advised that the jack was not well told appellee to let that matter alone until after they should see whether the jack got better or not. It further appears from the evidence that A. F. Hayes, the man from whom appellee purchased the jack, at the time of loading him in one of the cars was given a contract to sign, which he at first declined to do, but upon being assured by the agent at Marissa that it would have to be signed by him he signed it; and it further appears that this contract was a part of the bill of lading and that it contained a contract

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purporting to be between appellant and A. F. Hayes, shipper, stating that the jack was of the value of one hundred dollars and limiting the liability of appellant to one hundred dollars; also that no claim for loss or damage to the stock shall be valid against appellant, unless made in writing, verified by affidavit, and delivered to the agent within ten days from the time the stock was removed from the cars. Said contract also contained a clause providing, that the railroad company should not be liable for any injury, however caused, not resulting from gross negligence of the appellant. That it also contained a further clause that the car containing said jack was to be in charge of the shipper, or its agents while in transit and the shipper assumes the duty of loading and unloading said jack. It appears, however, from the evidence, that when Hayes signed said contract the contents of it was not explained to him and he knew nothing about the matters specified therein.

The declaration of appellee consists of one count and alleges the receipt of the jack by the defendant, to be safely and securely carried from Marissa to Golconda, and there be delivered to plaintiff, and that the defendant did not safely and securely deliver the same but on the contrary so carelessly and negligently behaved itself in the said premises that the said jack became and was injured by the defendant, and on account of said injury became wholly lost to the plaintiff. To this a plea of general issue was filed, and five special pleas. Each of said pleas setting up the contract above mentioned, and the first plea denied liability in a greater amount than one hundred dollars. The second denied liability because appellee had not presented a claim in writing verified by affidavit to appellant or its agents within ten days from the time the stock was removed from the car. The third and fourth special pleas deny liability because the appellant was not guilty of gross negligence in and about

the shipment of the jack. The fifth special plea denies liability because it says that under the terms of said contract the appellant in reloading the jack at Reevesville was acting as the agent of appellee. To these special pleas no replication was filed. Upon the trial of the case objection was made to the testimony of the witness A. F. Hayes concerning the signing of the contract above mentioned, and denying the knowledge of the contents or that the instrument was read over to him or he was in any manner informed of its contents. Also to the admission of the testimony of appellee wherein he states that he had attempted to make a claim for damages and spoke to the agent at Golconda about making the claim. It is contended by counsel for appellant that as the appellant had filed special pleas setting forth the specific matters in said pleas mentioned, respectively, and that as the appellee filed no replication thereto, or did not attempt by replication to confess and avoid these pleas, that the effect of it was simply to deny the matters set forth in the respective pleas, and that he had no right to introduce evidence showing that he did not read or know the contents of the writing, and other similar matters, for the reason that there was no replication and no pleading under which such testimony was admissible. In the argument counsel for appellant states that this evidence should have been stricken from the record, "For the reason that the contract in question was admitted in evidence, without objection, in support of the special pleas of the defendant, and was conclusive proof of all the matters alleged in said several special pleas, and the only issue upon said several pleas was a simple denial of the facts therein charged. Had the plaintiff filed a special replication to these pleas confessing and avoiding the same, and charged that the plaintiff would not be bound by the matters therein alleged, unless the attention of the shipper had been called thereto, and his assent obtained, such evidence might have been proper, etc."

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It is also insisted by the appellant, that even if the law required the appellant to prove the execution of the contract and that the shipper assented to its provisions, that such proof could not be required in this case because there was no issue made by the pleadings by which that question could be tried, and appellant claims that one case is made by the pleadings and another by the evidence, and that this could not be done. The criticism upon appellee's first, second, third and fourth instructions is along the same line and based upon the fact that no issue is made by the pleadings to support the third and fourth instructions, and no legal evidence introduced to support the second. All of these matters will be considered under the question made by appellant about the effect of the special pleas filed without replications thereto.

As we understand counsel for appellant, they do not deny that under the law the burden is upon appellant to show that the contract referred to as having been signed by the shipper was understood by the shipper, and we understand the law to be that the liability of the carrier can only be defeated by showing that the shipper who delivers his goods to the carrier for transportation and accepts a written contract of such shipment imposes the restrictions of knowing the contents of the contract and assents to its terms. The onus of proving this contract and such knowledge upon the part of the shipper, is upon the carrier. *Wabash R. Co. v. Curtis*, 134 Ill. App. 409; *Wabash R. Co. v. Thomas*, 222 Ill. 337.

It is first insisted by appellant that before it could present the defense that was offered that it was required that it should be specially pleaded and proven, and refers the court to the cases of *Gunton v. Hughes*, 181 Ill. 132, and *Wall v. Chesapeake & O. R. Co.*, 200 Ill. 66; but an examination of these cases will show that the question there arose upon the question of the plea of the statute of limitations, which is in a class

to itself and is not governed by the pleading in the class of cases now under consideration by the court. He also refers and quotes from Chitty, which says: "In actions upon the case the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea and all matters in confession and avoidance shall be plead specially as in actions of assumpsit." The Supreme Court of this State in passing upon this proposition and quotation from Chitty, says: "The rule at common law is that under the plea of not guilty, in an action on the case, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may also give in evidence any justification or excuse. 1 Chitty's Pleading (7th Am. from the 6th London Ed.) 527. The English rule, that 'in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement,' etc., was adopted by the judges at Hilary term, 4th William IV, * * * 1 Chitty's Pleadings, 737, and has never been adopted by statute in this State." *City of Champaign v. McMurray*, 76 Ill. 353. We are of the opinion that all of the matters set forth in the special pleas were admissible under the plea of not guilty; and being admissible under that plea there could be no error in permitting the appellee to make his explanation of and concerning those special matters. It is said by counsel for appellant that some action should have been taken upon these special pleas, which is true, and a demurrer to these pleas would probably have resulted in the court holding that they were unnecessary. The record discloses that under the pleadings as it existed, both appellant and appellee were permitted to introduce all

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of their testimony and that no complaint can be had for that reason, and the most that can be said with reference to the trial, under the pleadings as they were, is that it is a mere irregularity, and we do not believe that where it appears that no injustice has occurred by reason of a mere irregularity of pleading that such irregularity should work a reversal of a case.

We are further of the opinion that the appellant is in no position to complain about the admissibility of this testimony on account of the status of the pleadings, for the reason that the only specific objection made by counsel during the trial was, "On the ground that the matter is embodied in the special contract here in evidence," and nothing was said by counsel to the court about the want of a replication to these special pleas. No objection was made upon that ground during the trial and this objection is made for the first time in this court and we think it comes too late. The court's attention should have been called to the fact that special pleas were on file and no replication filed to them, and given an opportunity to pass upon the question, which was not done. This disposes of the question of the admissibility of evidence and the objections to appellee's instruction.

Appellant also contends that this case should be reversed upon the evidence. The facts as set forth in the statement herein are substantially all of the facts introduced in evidence, and there is no dispute as to the facts, and we think it was a question for the jury to determine whether or not under such facts the jury were warranted in finding that appellant was guilty of such negligence in and about the shipping of this jack as to make it liable for the value thereof. It was the duty of appellant to safely deliver such property at the place to which it was consigned, and it had no power to limit its liability in this respect but was bound by statute so to do.

It is the province of the jury to determine what acts

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do and do not constitute negligence, and where they have found that the acts proven do constitute negligence, a court of appeal would be slow to reverse such decision, unless it was so manifestly against the evidence and law as to require a reversal on that account.

Another objection urged, that the verdict of the jury as to the amount of damages is not sustained by the evidence. The evidence shows the value of the jack to be four hundred dollars, while the verdict is only three hundred dollars. We do not believe that appellant can complain or be heard to say that the judgment was for too small an amount. *Becker v. People*, 164 Ill. 267; *Florsheim v. Dullaghan*, 58 Ill. App. 593.

Objection is also made to the refusal of appellant's refused instructions Nos. 11, 12, 13 and 15, but what we have heretofore said with reference to the admissibility of the evidence under the pleadings answers the criticisms made upon these refused instructions. We see no reason why the appellant's refused instruction 14 might not have been given upon the proposition herein contained that the shipper, A. F. Hayes, should be regarded as the agent of the plaintiff and that the plaintiff should be bound by his acts. We think this proposition was fully covered by appellee's instructions 2 and 4, where the jury are advised that it is sufficient if the shipper knew that the conditions were in the bill of lading, and then afterwards referring to him as the agent of the plaintiff; and the jury were plainly advised that it is sufficient to bind the plaintiff if the shipper had knowledge of the restrictions contained in the contract, and this is the important thing sought by refused instruction No. 14 to be impressed upon the minds of the jury. The instructions as given and read to the jury, when taken as a whole, seem to present the law fairly.

After a careful reading of this record and fully considering the questions presented for our determination, we are of the opinion that appellant had a fair

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trial, and find no error of such importance as to require a reversal of the case, and the judgment of the lower court is affirmed.

Judgment affirmed.

**Herschbach Brothers, Appellants, v. Lucian Cassout
and Maggie Cassout, Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of Randolph county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

This was an action of replevin brought by Herschbach Brothers to recover two-thirds of twenty-five acres of wheat that had been harvested and ready to thresh. From a judgment for the defendant, the plaintiff appealed.

It appears from the record in this case that on September 1, 1913, the defendant Lucian Cassout made a mortgage to the State Bank of L. H. Gilster & Company, and that in said mortgage was included twenty acres of growing wheat. It further appears from the evidence that the mortgage, while it bore date of September 1st, was not acknowledged or recorded until the 11th of October. On the 4th day of October of the same year defendants confessed a judgment in favor of plaintiffs for the amount of \$101.10. Execution was issued and placed in the hands of the sheriff on the same day and on October 6, 1913, this execution was served by copy upon the defendants, and upon the same day defendants filed their schedule of personal property and in the schedule is included "25 acres of growing wheat, less rent of one-third," and

said schedule also contains the following clause: "Above property belongs to Lucian Cassout, and the mules, wheat and wagon are under mortgage, or contract to be mortgage placed on the wheat as soon as sown." On November 19th the plaintiffs caused the aforesaid execution, then in the hands of the sheriff, to be levied upon the 25 acres of wheat contained in said schedule, and on December 1, 1913, the wheat was sold at public auction by the sheriff and bid in by plaintiff in the execution at \$107.51. It further appears from the evidence that after the wheat had been cut by the defendant Lucian Cassout, and was ready to be threshed, the plaintiffs sued out this writ of replevin and obtained possession of such wheat. Upon the making of said schedule the sheriff did not select appraisers and the property set forth in the schedule was treated as exempt property. It was contended by the plaintiff that at the time the schedule was made the wheat in question had not been sown but was sown thereafter and prior to October 11th, and consequently was additional property acquired and subject to levy under plaintiff's execution as after-acquired property.

A. E. CRISLER, for appellants.

R. E. SPRIGG, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTION, § 6*—*when exempt property should not be subjected to sale under execution.* Where the court is satisfied that personal property is exempt, such property ought not to be subjected to sale under an execution, except it is clearly made to appear that the debtor has in some manner forfeited his right to the exemption.

2. EXEMPTIONS, § 26*—*when description of property in schedule*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of exemption controlling. Where a description of property listed in a schedule of exemptions may reasonably be construed as applying to property sold under an execution, such construction will be adopted.

3. REPLEVIN, § 105*—*when burden on plaintiff to prove property acquired after filing of schedule of exemptions.* In an action of replevin to recover property levied on under execution and alleged to be exempt, by defendants the burden of proving that the property was acquired after the filing of a schedule of exemptions is upon the plaintiff.

4. EXEMPTIONS, § 38*—*when levy on and sale of exempt property evasion of law.* A levy upon and sale of property which the levying officer knows is sought by the debtor to be exempted by his schedule will be treated as an evasion of the law.

5. EXEMPTIONS, § 25*—*what is duty of officer holding execution towards debtor.* An officer holding an execution is required to deal fairly and in good faith with the debtor and not to use the provisions of the exemption law to trap or catch debtors who are honestly and in good faith seeking to avail themselves of the benefit of its provisions.

6. EXEMPTIONS, § 3*—*how exemption laws construed.* The exemption laws are made for the purpose of protecting the poor and unfortunate and should be liberally construed by the courts, and the right of such debtors should be fully upheld without stint or grudging.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Charles Huffstuttler, Appellee, v. William Crabtree,
Frank Johnson and Isaac Johnson, Appellants.**

1. **ROADS AND BRIDGES, § 220***—*when evidence insufficient to establish wilful negligence of commissioner of highways in failing to repair road.* Evidence which does not satisfactorily show that the attention of commissioners of highways has been called to defects in roads under their supervision and care will not warrant a finding of wilful negligence of duty in failing to make repairs thereon.

2. **ROADS AND BRIDGES, § 220***—*when commissioner of highways not liable for defects in highway.* Commissioners of highways are not liable in damages for mere neglect to repair the roads in their town.

Appeal from the Circuit Court of Hamilton county; the Hon. JACOB R. CREIGHTON, Judge, presiding. Heard in this court at the March term, 1915. Reversed with finding of fact. Opinion filed December 1, 1915.

ISAAC H. WEBB and HARRY ANDERSON, for appellants.

J. H. LANE and THOMAS H. CREIGHTON, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This action was commenced before a justice of the peace, appealed to the Circuit Court of Hamilton County, where a trial was had and judgment rendered against the defendants for one hundred and fifty dollars and costs of suit, to reverse which judgment the defendants prosecute this appeal.

It appears from the evidence that the appellants were Commissioners of Highways of the Town of Flannigan in Hamilton County. That there was a public road extending nearly east and west through said town and is described by the witnesses as a road passing by the residence of one William B. Johnson. On

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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this road and near the residence of said Johnson was a culvert of the length of about twelve feet and of the width of about four feet. There was a plank broken out on the south end of the length of about four feet or five feet, and the north end of about two and one-half or three feet. Some of the witnesses described the plank broken on the north end as having the appearance of being bent down by an engine or some heavy vehicle crossing it, but not entirely broke in two, while others say it was entirely broken off.

It appears from the evidence that on October 15, 1912, appellee with his family was driving a two horse vehicle across this culvert and one of the horses stepped into the hole of the north end of the culvert, fell and broke his leg from which injury he afterwards died. It further appears from the evidence of a portion of the witnesses that the hole had been there for some two or three weeks, while other witnesses testify to having passed over the bridge a short while before the injury without observing this hole. There was also a mud hole about one hundred yards east of this bridge and some abutments out of repair on a bridge about one-fourth of a mile west of the culvert. The commissioners had divided the work of the town and the part on which this culvert was located was allotted to the defendant Crabtree, who lived about one mile and a half from the culvert, the other commissioners living still further away. About one month previous to the accident Gus Matheny, a mail carrier, testified that in a conversation with appellant Crabtree he asked him if he could not fix these bridges and mud holes in shape so that they could be traveled upon, and says that at that time they were standing about fifty yards from this culvert and that Crabtree said he would have them fixed and thereafter and on about the 20th of September sent the overseer of the highways, who fixed the approach to the bridge and the mud hole but did not fix this culvert. Crabtree says that in the conversation

with Matheny his attention was called to the mud hole and he was asked to fix it but denies that his attention was called to this culvert, and Matheny says that he does not remember whether he called his particular attention to the culvert or not. William Die, the overseer who fixed the mud hole and repaired the approach to the bridge, says that he noticed that a plank was broken out of the south end of this bridge but did not notice anything wrong with the north end; that he had no plank wherewith to repair the south end and never informed Crabtree of the defective condition of the culvert. It further appears from the evidence that after the accident Crabtree directed the overseer to get some lumber and repair the culvert, which he did.

During the argument of this case counsel referred to and cited authorities upon the question of liability of commissioners of highways for a wilful failure to repair the highways in their town. We do not regard it as necessary to determine, and do not decide, as to whether or not a wilful failure upon the part of the commissioners would create a liability or not, as we are of the opinion that the facts in this case do not warrant a finding of wilful failure to discharge the duties of the office. It does not appear from the evidence that any of the appellants had knowledge of the condition of this specific culvert, and no witness testifies that their attention was called to it, while the witness Matheny says he called Crabtree's attention to the fact that the roads and bridges in that neighborhood needed repairing, yet he says he does not know whether he called his attention to this bridge or not but Crabtree says he did not call his attention to this bridge; and it further appears that within a short time after Matheny spoke to Crabtree about the condition of the roads that Crabtree sent the overseer to repair them and the overseer says that he made the repairs, except that he put no plank on the south end of this culvert because he had none, but never advised Crabtree

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of the condition of the culvert, and there is certainly no claim that the other appellants had any knowledge of the condition of this road. We cannot say and do not believe that this testimony discloses a deliberate purpose upon the part of the appellants not to discharge the duties required of them. "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law."

* * *

"Outside of statutes which exist in one or two States, denouncing wilful negligence, some of the cases lay down the doctrine that an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care, with the consequences of a wilful injury." Sections 20-22, vol. 1, Thompson on Negligence.

In view of the evidence as disclosed by the record in this case, we are of the opinion that no such state of facts is shown as warrant a finding of wilful negligence of duty, and the case will be considered and decided upon the question as to whether or not commissioners of highways are liable for mere neglect to repair the roads in their town.

It is strenuously insisted by counsel for appellee that for highway commissioners who have ample means at their command to neglect to repair the roads and to permit their roads to remain in such a condition as to be unsafe to travel upon is unjust to persons who may have occasion to use such highways, and while there may be much force in the argument presented, yet we are of the opinion that it is not an open question in our courts. It has been held by the highest courts of this State that while towns have power to levy taxes,

"they are not liable, in a common law action, for damages sustained by an individual on account of such action being neglected or inadequately performed.

* * * The reasons always given for exempting towns from such actions are, that they are established as local subdivisions and agencies of the State for governmental purposes, and that duties are imposed upon them without their assent, exclusively for public purposes. The same reasons apply, with at least equal force, to commissioners of highways as an agency through which a town performs a public duty. * * *

If he should neglect to perform any of the duties enjoined upon him while acting, the public injury renders him liable to a penalty of not less than ten dollars nor more than fifty dollars. The office and its duties are compulsory, and are imposed upon the individual for public purposes, in like manner as upon the town. The court draws a distinction between the town and the municipal corporation proper, on the question of liability, in favor of the town, and it would seem most unjust to reverse the rule as to the town officer and hold him to the same responsibility as a city or other municipal corporation. * * * The statute has provided means for redressing the public wrong by a penalty, and that is sufficient to enforce the public duty.

* * * The decision in *Bartlett v. Crozier*, *supra* (17 Johns. 439), that an action would not lie against an overseer of highways at the suit of an individual for an injury which he had sustained in consequence of the neglect of the overseer to keep a bridge in repair, was quoted approvingly in *Hollenbeck v. Winnebago County*, 95 Ill. 148, and later decisions in New York of a different character were ignored. Being of the opinion that plaintiff had no right of action, the judgment will be reversed." *Nagle v. Wakey*, 161 Ill. 387. We think the dissenting opinion filed in the cause last above cited delineates and emphasizes the fact that the Supreme Court in that case intended to exempt com-

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missioners of highways from liability for damages for neglect to repair.

Again, in the case of *Kennedy v. McGovern*, 246 Ill. 497, holds that the amendment of 1907 to section 51, of the Roads and Bridges Act (J. & A. ¶ 9810), which makes highway commissioners in counties not under township organization, personally liable for injury to person or property due to their failure or neglect to keep the highways of their district in repair is invalid as special legislation, there being no reasonable ground for making commissioners liable in counties not under township organization, and not making commissioners under township organization liable under the same conditions. We think that the court in its argument in that case necessarily reached the conclusion that commissioners of highways of towns in counties under township organization were not liable in damages for failure or neglect to keep the roads and bridges in good repair. It is there said: "The commissioners in both classes of counties have the same general responsibilities, and no liability for injury because of neglect to keep the highways in repair should be imposed upon one class that is not imposed upon the other. In a county not under township organization persons injured on the highway might, under this amendment, recover damages for such injuries from the commissioners of highways, when under exactly similar circumstances persons injured on this same highway but just across the county line, in a county under township organization, could not recover." *Kennedy v. McGovern, supra*.

It appears to us from a consideration of the cases that the Supreme Court of this State has reached the conclusion that a commissioner of highways is not liable in damages for mere neglect to repair the roads in his town, and we do not believe that the appellants, under the law, are liable to appellee for the damages

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sustained, and the judgment of the lower court is reversed.

Judgment reversed with finding of fact.

Finding of fact. The court finds as a fact that the defendants were not guilty of wilful negligence.

H. L. Thompson, Appellant, v. John Sprague, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Saline county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action of forcible detainer by H. L. Thompson, plaintiff, against John Sprague, defendant. From a judgment for defendant, plaintiff appeals.

The plaintiff's grantor having leased a farm to the defendant for a term of one year, which later became a tenancy from year to year by defendant's holding over, transferred his interest to the plaintiff who, in turn, leased the premises back to him; the defendant still treating the grantor as his landlord and being ignorant of the conveyance and lease. After the expiration of the lease the plaintiff brought this action for the possession of the property.

JAMES B. LEWIS and JOHN L. THOMPSON, for appellant.

W. F. SCOTT, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 4*—*when subtenancy not created.* A tenancy cannot be changed into a subtenancy by the execution by the landlord's grantee to the landlord of a lease of which the tenant has no knowledge.

2. FORCIBLE ENTRY AND DETAINER, § 71*—*what purchaser of interest of landlord must prove to maintain action against tenant.* In an action of forcible detainer against a tenant lawfully in possession at the time of the plaintiff's acquisition of the landlord's interest in the premises, the plaintiff must show affirmatively not only his acquisition of title but, further, that the tenant's rights under and by virtue of the tenancy have terminated.

3. FORCIBLE ENTRY AND DETAINER, § 32*—*what notice must be given tenant from year to year.* A tenant from year to year is entitled to sixty days' notice to terminate his tenancy before an action of forcible detainer can be maintained against him.

4. INSTRUCTIONS, § 10*—*when giving large number improper.* The practice of submitting large numbers of instructions upon simple issues is to be condemned as tending to confuse rather than to aid the jury in their deliberations.

5. JUDGMENT, § 270*—*when court may amend record of nunc pro tunc.* The court may on motion made after the expiration of the term at which a judgment is rendered correct the record thereof *nunc pro tunc*.

6. FORCIBLE ENTRY AND DETAINER, § 11*—*when owner executing lease may not maintain action.* An owner of property, having executed a lease thereof under which the lessee is entitled to possession, may not maintain an action of forcible detainer against one in possession.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Huss, Appellant, v. J. W. Ford, Appellee.**(Not to be reported in full.)**

Appeal from the Circuit Court of Fayette county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by Henry Huss, plaintiff, against J. W. Ford, defendant, on a promissory note. From a judgment for defendant, plaintiff appeals.

The plaintiff's assignor was authorized by the defendant to select suitable property and negotiate an exchange thereof for property of the defendant, which exchange was subsequently effected in accordance with a contract, entered into by plaintiff's assignor in the name of the defendant as principal with a third party, one of the terms of which stipulated that such other party to the exchange should pay to the plaintiff's assignor a specified amount as commissions. As a defense to an action by the plaintiff on the defendant's note for commissions it was claimed that the note was void as the plaintiff's assignor had contracted for commissions with both parties to the transaction.

F. M. GUINN, for appellant.

BROWN & BURNSIDE, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 1***—*when person agent and not broker.* One who is given power to examine property and determine whether a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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trade of other property therefor should be made and who is not employed simply to bring the parties together is an agent and not a broker.

2. **PRINCIPAL AND AGENT, § 69***—*when agent not entitled to recover commission from both parties.* An agent who is given power to examine property, to determine the advisability of an exchange, and to bring the parties together may not recover commissions from both parties.

3. **EVIDENCE, § 322***—*when parol evidence inadmissible to vary terms of contract.* As between a party to a contract and his agent executing it in his name, where the terms of such contract are definite and certain, parol evidence cannot be admitted to vary its terms.

4. **EVIDENCE, § 322***—*when parol evidence inadmissible to vary contract for payment of commissions.* In an action by a real estate agent against his principal to recover on a note given in payment of commissions, the plaintiff cannot show by parol that money stipulated in a contract for the exchange of property entered into by him as agent in the name of his principal, to be paid to the plaintiff by the other party to the trade as brokerage fees, was in fact, to be paid and was received for and on account of another party.

Louis Rahe and Herman Rahe, Appellees, v. Henry Jobusch, Joseph H. Gauen, Charles Wischmeier and Lena Wischmeier, Executors of Will of D. Wischmeier, Deceased, impleaded with Frederick Jobusch et al., Appellants.

1. **EXECUTORS AND ADMINISTRATORS, § 101***—*power of executor over property as against trustee.* Where a will creates an executor and also a trustee, and gives each of them power over the property without specifying the particular property that each shall have jurisdiction over, the law favors the settlement of the estate by the executor and the determination of the amount that shall pass to the trustee.

2. **EXECUTORS AND ADMINISTRATORS, § 101***—*when testamentary trustee may divest executor of property.* A testamentary trustee

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tee cannot divest the executor of the property until a reasonable time has elapsed for the settlement of the estate.

3. EXECUTORS AND ADMINISTRATORS, § 81*—*when chargeable with loss of uncollected personal debt.* An executor who owes a note to an estate which he could have collected with the exercise of reasonable diligence and fails to make such collection is chargeable, under Hurd's Rev. St., ch. 3, § 58 (J. & A. ¶ 107), with the amount so lost.

4. JUDGMENT, § 692*—*conclusiveness of judgment of County Court.* The fact that it has been adjudicated and determined by the County Court that a fund was held by a person as executor and not as testamentary trustee, is of weight in determining in what capacity the fund was received and controlled by him.

5. EXECUTORS AND ADMINISTRATORS, § 81*—*when not insolvent so as to be excused for not collecting personal debt.* In an action to set aside an order of the County Court discharging an executor and for a determination as to whether the sureties on the executor's bond or those upon his bond as trustee were liable, and for an accounting, evidence held sufficient to sustain a finding that the executor, who owed a note to the estate, was not insolvent at a certain time, and that he could have collected the debt out of his property with the exercise of reasonable diligence.

6. EXECUTORS AND ADMINISTRATORS, § 582*—*when surety liable upon bond of executor.* The simple fact that a person becomes a surety upon an executor's bond does not make such surety liable for a debt that such executor may be owing the estate.

7. EXECUTORS AND ADMINISTRATORS, § 550*—*when evidence sufficient to establish fraud in procuring order of discharge.* In an action by legatees of a will against the executor, both in such capacity and as testamentary trustee, and against the sureties on the trustee's bond to set aside an order discharging the executor and for a determination as to whether the sureties upon the executor's bond or those upon the trustee's bond were liable, and to what extent, and for an accounting, evidence held sufficient to sustain a finding that such order was procured by fraud, so as to authorize setting it aside.

8. EXECUTORS AND ADMINISTRATORS, § 85*—*when duty of executor to compound and sell claims.* It is the duty of an executor, where a claim owed to the estate is doubtful or desperate, to make application to the court to compound and sell the claim.

9. JUDGMENT, § 493*—*when surety bound by judgment against executor.* An adjudication by the County Court made upon the final report by an executor that the executor had a certain sum in his hands for distribution, and directing him how to make dis-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tribution, is conclusive upon the executor and upon his sureties under Rev. St., ch. 3, § 115 (J. & A. ¶ 165).

10. JUDGMENT, § 364*—*when judgment of County Court cannot be collaterally attacked.* The judgment of the County Court approving the final report of an executor and ordering payment from the funds in his hands cannot be collaterally attacked except for fraud.

11. EXECUTORS AND ADMINISTRATORS, § 153*—*what constitutes devastavit by executor.* An executor who fails to make payment according to the order of the County Court is guilty of a *devastavit*.

12. EXECUTORS AND ADMINISTRATORS, § 153*—*recovery on bond of executor for devastavit.* Where an executor is guilty of a *devastavit* in not making payment pursuant to an order of the County Court approving his final report and requiring payment out of funds in his hands, suit may be maintained on the bond of such officer and the judgment together.

Appeal from the Circuit Court of Monroe county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

B. R. BURROUGHS and ROY E. GAUEN, for appellants.

J. M. BANDY and D. J. SULLIVAN, for appellees.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The appellees *et al.* recovered a decree against the appellants, in the Circuit Court of Monroe county, for \$7,277.40, which decree is sought to be reversed by this appeal.

It appears from the record in this case that Frederick William Rahe died testate prior to February 13, 1906, and that by the terms of his will he provided: First. "I order and direct that my executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be." Second. Is a devise of real estate therein described to Henry Rahe. Third. "I give and devise to Frederick Jobusch, as trustee, with directions to him as such testamentary trustee, to pay out of all cash moneys and notes as follows:

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

"First. To pay my just debts which I may owe at the time of my death.

"Second. To pay forty dollars for a tombstone.

"Third. To pay to Anna Rahe, widow of my son, Henry Rahe, the sum of twelve hundred dollars when my grandson, Henry Rahe, becomes twenty-one years of age. After paying the above, the balance of all cash and notes is to be divided equally between my grandchildren, Louis Rahe, Herman Rahe, George Rahe, Otto Rahe and Edward Rahe, to be paid to them by said Frederick Jobusch as trustee, when they attain their majority. Lastly, I hereby nominate and appoint Frederick Jobusch to be the executor of this, my last will and testament, hereby revoking all former wills by me made."

On February 17, 1906, Frederick Jobusch was appointed and gave bond, which was approved by the court, and qualified as executor of said estate, and on May 8, 1906, filed an inventory of the real estate and personal property of said estate, and included in such inventory a note for the amount of \$3,050, and interest, owing by himself and his wife Elizabeth Jobusch, to said estate. That on May 5, 1908, he made a final report to the court as such executor and in the report charged himself with all moneys collected, including the note and interest owing by himself and wife; and credited himself with the moneys paid out, at which time it left in his hands a balance of \$8,280.54, which report was approved by the court and the executor was ordered to pay Anna Rahe out of said sum the amount of \$1,200 when Henry Rahe became twenty-one years of age, which the court found to be on April 2, 1908, and that the remaining balance of \$7,080.54 be paid to the testamentary trustee, Frederick Jobusch, on entering into bond in the sum of \$15,000; and on July 16, 1908, he filed in the office of the County Court a receipt as executor from Frederick Jobusch, testa-

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mentary trustee, for the amount of \$7,080.54, also a bond as such testamentary trustee for the amount of \$15,000, which bond was approved and an order entered discharging said Frederick Jobusch as executor aforesaid.

There was evidence introduced pro and con tending to show solvency and insolvency of Frederick Jobusch during the time he was executor, which testimony will be hereafter examined and commented upon. This bill was filed by the appellees against the appellants and the sureties upon the bond given by Frederick Jobusch as testamentary trustee and other parties who were interested as legatees under the will. The bill with its amendments sets forth the facts substantially as above stated, and asks that the order discharging the executor be set aside, and a determination by the court as to whether the sureties upon the bond of Jobusch as executor, or those upon his bond as trustee, or both of them, are liable and to what extent, and for an accounting. Except as to the parties which were afterwards changed by order of this court, the bill more in detail is shown in the case of *People v. Jobusch*, 165 Ill. App. 540, which was heard by this court at a former term. To this bill an answer was filed by the appellants denying any liability as the makers of the executor's bond, and states that the executor made a final settlement and payment to Frederick Jobusch as trustee aforesaid and in the manner aforesaid. The sureties upon the bond as trustees deny liability because they say that the County Court had no authority to take such bond, and that the bond taken was void and that the liabilities were against Frederick Jobusch individually as such trustee.

The lower court in its decree determined that the executor and sureties upon his bond as such executor are liable for the total amount of the deficiency herein shown to exist, and to this the appellants preserve an exception.

A proper determination of the question as to the parties upon which bond or bonds, if any, are liable, will require a consideration of two propositions, the first of which is: Was the property devised received by Frederick Jobusch as executor of William Rahe, Sr., or as trustee under the will? The first clause directs the executor to pay all debts and funeral expenses. The third clause gives to Frederick Jobusch, as trustee, with directions to him as such testamentary trustee, to pay out of all cash, moneys and notes as follows: \$40 for tombstone; \$1,200 to Anna Rahe; and after paying the above the balance of all cash and notes to be divided equally between my grandchildren, naming them; to be paid to them by said Frederick Jobusch as trustee when they attain their majority. And the will concludes by appointing Frederick Jobusch as executor. It is contended by counsel for appellant that the effect of this will was to pass this property directly and immediately to Frederick Jobusch, as trustee, and that the title vested in said trustee subject only to the payment of the debts and funeral expenses. We cannot agree with this contention. Where a will creates an executor and also a trustee, and gives each of them power over the property, without specifying the particular property that each shall have jurisdiction over, we are inclined to think that the law would favor the settlement of the estate by the executor and ascertaining the amount that would pass to the trustee, which could only be done after the executor had completed his duties. "The law seems to favor the administration of the estate by the executor rather than by the trustee, and unless it clearly appears from the will that the testator intended it to be held by the trustee the executor is to be considered as holding it; and where the will provides for the coexistence of the two functions of executor and trustee, the persons exercising those duties do so as executors and not as trustees." *Am. & Eng. Encyc. of Law*, vol. 28, p. 936.

Under our statutes an executor could settle an estate, collect the debts and take care of doubtful claims with much better advantage to the estate than a trustee could, as our statutes give an executor or administrator, where a claim is doubtful or where there is some equitable or legal defense to any claim, the power, under such circumstances, to apply to the County Court for an order compounding such claims and selling them, which power is not given to a trustee. Section 83, ch. 3, of Hurd's Revised Statutes. (J. & A. ¶ 133.) This would be of much advantage to an estate and the courts are inclined to adopt that rule which would be most advantageous in the settlement of estates. It is said by our Supreme Court: "It is, of course, true that where the same person is executor and trustee, his duties in the two relations are separate and distinct and he does not take a fund as trustee until it is separated from the general funds in his hands as executor, but when his duties concerning a fund as executor are completed and his duties as trustee begin, it becomes his duty to hold the fund as trustee, and a court of equity will regard that as done which ought to be done." *Fenton v. Hall*, 235 Ill. 557.

Under the provisions of this will Frederick Jobusch was created executor and trustee and practically the same fund given to him in each capacity, and it seems to us that under such circumstances he chose to receive the property as executor and to act in that capacity in the settlement of the estate, that the will would not require him to take the property as trustee out of his hands as executor and administer it as trustee, and were some third person designated by the will as trustee instead of himself we feel quite sure that such third person could not divest him of the property as executor until a reasonable time had elapsed for a settlement of the estate. In this case there could be no doubt that Frederick Jobusch did assume the duties and take charge of these funds as executor. He gave

bond as such executor, filed an inventory of all of the property of the estate, charged himself with it as executor, and then proceeded to collect the notes as executor and made a final report showing that he had collected the several notes and claims inventoried and presented this report to the court, which was approved, and thereupon an order was made to pay the balance to him as testamentary trustee. We think this mode of procedure and investing of the property in the trustee, after a reasonable time has been given for settlement as executor, is well sustained by the case of *Bell v. People*, 94 Ill. 230. The fact of its having been adjudicated and determined by the County Court that this fund was held by Jobusch as executor is also of weight in determining in what capacity the fund was received and controlled by him. The cases of *People v. Huffman*, 182 Ill. 390; and *People v. Petrie*, 191 Ill. 497; *Weir v. People*, 78 Ill. 192, which hold, in substance, that the bond of an executor is not liable for a fund passed to a trustee, are not in our judgment in conflict with the conclusion herein arrived at, and while it is true it was held in the case of *Weir v. People*, *supra*, where Kraft was appointed administrator of estate of Jacob Britzer, Jr., and received a fund as such administrator, to which fund Jacob Britzer, Sr., was the sole heir, who died one month later leaving a will and appointing Kraft as executor, that Kraft thereafter paid no attention to the fund received as administrator but proceeded to treat the fund as belonging to Jacob Britzer, Sr., and held it as his executor and made no further account of it to the estate of Jacob Britzer, Jr., that the fund had passed to him as executor of the estate of Jacob Britzer, Sr., and that the bondsmen of the administrator of Jacob Britzer, Jr., were not liable. This case, however, was so determined principally because the fund held by Kraft as administrator belonged to the estate of Jacob Britzer, Sr., and that it was treated by the executor as having

passed from his hands as administrator of Jacob Britzer, Jr., to his hands as executor of Jacob Britzer, Sr., and we do not believe that this case is in conflict with the rule above announced. We are of the opinion that Jobusch held this fund as executor.

It is contended that after the settlement of the estate an order was entered by the County Court directing the payment of this fund to Jobusch as trustee and that thereafter he presented a receipt from himself as trustee, which was approved by the court and the executor and the sureties upon his bond were discharged. It is very clear from the evidence in this case that at the time Jobusch presented this receipt and secured an order discharging the sureties upon his bond that at that time he had no money or means with which to pay the amount that had been determined was in his hands, and that the procurement of this order was a fraud upon the court, and is by this proceeding sought to be set aside. We think that the court was warranted in holding, under the evidence, that this proceeding was a fraud upon the County Court, and that he did not err in setting aside this order.

The second proposition to be determined is as to the liability of appellants for the full amount less any payments since made, ascertained by the County Court to be due in this estate. The contention is that the note owing by Jobusch and his wife to the amount of \$3,050, and interest, was in fact never paid, and for that reason the sureties upon the bond are not liable. We recognize the rule that the simple fact that a person becomes a surety upon an executor's bond does not make such surety liable for a debt that such executor may be owing to the estate. If, however, such executor owing said debt is able to pay the debt and he fails to collect it, then he fails in the discharge of his duties as required by law. "Executors and administrators shall be chargeable with so much of the estate of the decedent, personal or real, as they after due and

proper diligence might or shall receive." Section 58, ch. 3, Hurd's Revised Statutes. (J. & A. ¶ 107.) Reasonable diligence was required of Jobusch to collect this debt even from himself and wife, and if it could have been collected by reasonable diligence and he failed to do so, then we think he is chargeable under this statute with the amount so lost to the estate. *Whitney v. Petticord*, 63 Ill. 249. This doctrine is recognized by appellants but they contend that Jobusch was insolvent all this time and that they could not have collected the debt from him; while the evidence shows that during this time he was largely indebted to other persons, and it may be that had his property been subjected to sale for the payment of his debts that it was doubtful if he was solvent but Jobusch thought his business was in good condition and never realized there was any question about his insolvency until 1909, at least one year after his report as executor had been approved, and the evidence shows that during this time he was the owner of a homestead of the value of \$3,500, and stock of goods of the value of \$10,000, and an undivided one-eighth interest in eight hundred acres of land, such interest being of the value of about \$5,000, none of which was incumbered. He also had accounts upon his books to the amount of about \$20,000, but there is no evidence as to the value of these accounts. Even if he was largely indebted, we think that the court was warranted in holding that under the circumstances he certainly could have made this money out of that property for this estate. If it were true that this was a doubtful or desperate claim against the estate, then it became his duty to make application to the court to compound and sell the claims, for it certainly was of some value, but he did not do this and we presume for the reason that he supposed it was good, and being so he certainly could have secured payment with the property he had on hand. In this case, however, there was an adjudication by the County Court made

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upon the final report, that the executor had in his hands for distribution, \$8,280.54, and he was directed how to distribute the same, and we think that this order must be conclusive not only upon the executor but upon his sureties and cannot be attacked except for fraud, and we see no evidence of fraud up to that date in this record. "Where a report is made by an administrator or executor, and there has been an adjudication by the court approving that report and ordering payment from the funds in the hands of such administrator, that judgment is evidence that is conclusive on such administrator or executor, as also upon his sureties, by the express provisions of section 115, of ch. 3 of the Revised Statutes. (J. & A. ¶ 165.) Upon failure to pay over in accordance with such order of the court, the executor or administrator is guilty of a *devastavit*, and suit may be instituted upon the bond of such officer. Such suit is on the bond and judgment itself, and such judgment, when offered in evidence, showing the approval by the court and order to pay over, is like any other judgment of a court of competent jurisdiction, that cannot be attacked in such collateral action except for fraud. *Ralston v. Wood*, 15 Ill. 159; *Housh v. People*, 66 id. 178; *Frank v. People*, 147 id. 105." *People v. Huffman*, 182 Ill. 407.

We believe that the lower court was warranted in holding the sureties upon the executor's bond liable for such part of that fund as had not been paid.

Counsel for appellant in his reply brief says that the amount decreed to be paid was at all events \$400 too much, but he does not point out how he arrives at that conclusion or wherein any error was made but after a computation of the interest upon the amount left, after deducting payments, we do not find such error to exist.

After a careful consideration of this case we are not able to say that the court committed any error in its findings and its conclusions and the decree of the lower court is affirmed.

Decree affirmed.

Nicholas Gill, Appellant, v. John Gill, Sr., Appellee.**(Not to be reported in full.)**

Appeal from the Circuit Court of Perry county; the Hon. GEORGE A. CAW, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action of forcible detainer by John Gill, Sr., plaintiff, against Nicholas Gill, defendant, to recover possession of land alleged to have been wrongfully withheld from plaintiff by defendant. From a judgment for plaintiff, defendant appeals.

Plaintiff purchased the premises in question from one William McConnell for \$1,500. Some time during the following March defendant took possession of said premises at the request or with the consent of plaintiff. Defendant claimed that the arrangement made between him and his father was that he was to rent the place and give his father one-third of the crops, if the latter needed the same; that plaintiff was to keep up the taxes; that defendant was to have possession of the place as long as plaintiff lived, and that it was to belong to defendant; that he went on the place under this arrangement, made valuable improvements in expectancy of future ownership, and fulfilled his part of the contract. Plaintiff claimed that the relation between the parties was that of landlord and tenant; that the tenancy was one from year to year, commencing on the first day of March in each year, and providing for a crop rent.

On December 11, 1911, plaintiff served a written notice upon appellant to vacate said premises on March 1, 1912, which he failed to do. That thereafter this suit was instituted. The evidence was conflicting, but it appeared from the testimony that a greater number

of witnesses were introduced on behalf of the defendant than plaintiff. Defendant denied specifically that his father rented the land to him as long as he did good on the place but said: "While he came to me and told me to take possession of this place and to farm it as my own farm, that it would be mine at his death * * *. And if he needed the rent he wanted it, and if he did not need the rent I need not pay the rent but I had to pay taxes." He also testified: "He got his rent every year with the exception of the one year he gave me the corn." The next witness introduced by defendant was his brother, John Gill, Jr., who testified: "Why he told me he had bought the McConnell place and was going to give it to Nick, he was going to put Nick on the place." Upon cross-examination the witness seemed to be uncertain whether his father said he was going to rent the place to Nicholas or not, and in answer to the question: "Q. Did he use the word rent or not? A. I don't know he might have said rent." The witness thereafter said he didn't think the word "rent" was used.

The witness Carter testified that plaintiff talked to him and told him: "He bought a farm, his Perry County eighty acre farm for Nicholas and he said he gave it to Nicholas, and after his death it belonged to Nicholas." The witness Roberts testified: "Why, he told me that he had bought Nicholas and John a place, and Nicholas was not doing to suit him and he was going to be boss." This was a conversation between witness and plaintiff about the trouble they were having in their respective families, and upon cross-examination witness admitted his hearing was not very good. Plaintiff denied that he had this conversation with this witness.

POPE & COOK, for appellant.

J. PAUL CARTER and A. R. DEY, for appellee.

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MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 21*—*whether relation of landlord and tenant exists as question for jury.* In an action of forcible detainer, *held* that it was a question for the jury whether the relation of landlord and tenant existed between plaintiff and defendant.

2. APPEAL AND ERROR, § 1413*—*when verdict will not be set aside as against weight of evidence.* A verdict will not be set aside as against the weight of evidence where two juries have found for the plaintiff.

3. FORCIBLE ENTRY AND DETAINER, § 25*—*when equitable defense waived.* In an action of forcible detainer, *held* that defendant had waived any right which he may have had to make an equitable defense.

Clay Frechett, Administrator of the Estate of Lewis W. Johnston, Deceased, Appellee, v. Illinois Central Railroad Company, Appellant.

1. JURY, § 50*—*when discharge of jury within discretion of court.* The matter of discharging a jury after the trial of the case has been started, upon the ground that one of the jurors is related to one of the attorneys, lies in the discretion of the trial court.

2. JURY, § 50*—*when discretion to discharge jury not abused.* The trial court did not abuse its discretion in refusing to discharge the jury after the trial had been started on the ground that one of the attorneys was related to one of the jurors, where the affidavit in support of the motion did not clearly disclose the relationship, and the attorney immediately withdrew from the case upon the making of the motion.

3. EVIDENCE, § 228*—*when testimony of deceased witness at former trial may be admitted.* The testimony of a witness upon a previous trial, as incorporated in the bill of exceptions, may be read upon a second trial where the witness at the time of the second trial is deceased, and the court reporter, who took the testi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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mony at the former trial, testifies that he took such testimony, that it was, to the best of his knowledge and belief, true and correct, and that his notes were accidentally burned, as this did not constitute a reading from the bill of exceptions. (Distinguishing *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 318.)

4. RAILROADS, § 733*—*when evidence sufficient to establish killing of person by train.* In an action for death of a person alleged to have been killed while attempting to cross a railroad track on a path near a station, evidence held sufficient to establish that deceased was killed by one of defendant's trains.

5. PLEADING, § 431*—*what does not constitute variance.* There is no variance between the declaration and the proof where the allegations of the declaration are proved substantially in the manner alleged.

6. RAILROADS, § 509*—*who is not trespasser.* One who uses a much frequented cinder path across a railroad near a station in a populous part of a city is not a trespasser.

7. RAILROADS, § 588*—*whether railroad company guilty of wilful and wanton conduct in operation of train as question for jury.* In an action for the death of a person who was killed by a train while attempting to cross a railroad track near a station in a populous portion of a city, held that it was a question for the jury, whether defendant was guilty of wilful and wanton conduct in the operation of its train.

8. RAILROADS, § 583*—*when evidence sufficient to establish wilful and wanton conduct in operation of train.* In an action for the death of a person who was killed by a train while attempting to cross the tracks of a railroad near a railway station in a populous portion of a city, evidence held sufficient to sustain a finding that the defendant was guilty of wilful and wanton conduct in the operation of its train.

9. TRIAL, § 128*—*when comment on evidence in argument not improper.* It is not improper argument for the attorney for the plaintiff, in action for the death of a person, who was killed while attempting to pass over railroad tracks near a station in a populous portion of a city, alleged to be due to reckless operation of a train of defendant's, to state that if the engineer was indicted for murder and the evidence was the same as in the present case, he could not escape.

10. TRIAL, § 131*—*where conduct of counsel in commenting on witness improper.* The conduct of counsel in calling a witness "poor Bice, commonly known as Burrhead Bice," without any foundation in the evidence therefor, is improper.

11. APPEAL AND ERROR, § 1514*—*when improper conduct of coun-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sel not reversible error. While the conduct of counsel in calling a witness "poor Bice, commonly known as Burrhead Bice," without any foundation in the evidence therefor, is improper, still such conduct does not constitute reversible error.

12. DEATH, § 67*—*when damages not excessive.* In an action for death of a man sixty years of age who had been earning \$1,000 per year, a verdict for \$8,000 held not excessive.

13. APPEAL AND ERROR, § 1539*—*when giving of inapplicable instruction not prejudicial error.* The giving of an instruction defining negligence, when no such question is involved in a case, does not constitute prejudicial error where it could not have affected the result of the case.

14. RAILROADS, § 593*—*when instruction not erroneous as depriving defendant of defense that plaintiff was trespasser.* In an action for death of a person killed while attempting to cross the tracks of a railroad on a much frequented path near the station in a village, an instruction which required the jury, as a prerequisite to a verdict for plaintiff, to find that the train was operated in a wilful and wanton manner, as defined in other instructions, was not erroneous as depriving the defendant of the defense that deceased was a trespasser, as, if the act was wilful and wanton, the mere fact that deceased was a trespasser was immaterial.

15. INSTRUCTIONS, § 138*—*when refusal of instruction as to immaterial matter harmless.* It is not prejudicial error to refuse an instruction directing a verdict for want of proof of an immaterial matter.

16. INSTRUCTIONS, § 151*—*when not error to refuse requested instruction.* It is not error to refuse an instruction covered by other given instructions.

Appeal from the Circuit Court of Pulaski county; the Hon. A. W. Lewis, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

L. M. BRADLEY, W. W. BARR and CHARLES E. FEIRICH, for appellant; BLEWETT LEE and W. S. HORTON, of counsel.

WALL & MARTIN and JAMES LINGLE, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellee obtained a judgment against the appellant in the Circuit Court of Pulaski county, which is sought to be reversed by this appeal.

The declaration as originally filed consisted of five counts. The court directed a verdict for the defendant at the close of plaintiff's evidence as to all of the counts except the second count and the trial proceeded upon the second count. The second count alleges that the railroad of appellant passed through the Village of Ullin, a densely populated community, and crossed a certain traveled way in said village used by the public as a crossing for pedestrians, at a point a short distance north of the passenger station at Ullin, and had been so used for fifteen years, and as deceased was traveling from his place of business, over appellant's railroad at the place aforesaid to his residence, appellant by its servants drove a certain train towards the traveled way, and while deceased was rightfully traveling upon said traveled way appellant wilfully, wantonly and negligently drove and managed the said train, in that the locomotive was without a headlight although dark, and was running at a reckless and dangerous rate of speed in Ullin, to wit, forty-five miles per hour, and no bell or whistle sounded, and that by and through the carelessness, wantonness and wilful negligence Johnston was killed.

This case was decided by this court at the March Term, 1914 (188 Ill. App. 377), upon substantially the same facts (barring two or three matters which will be noted hereafter) as appear in the present record, but as the statement made by the court at that time was not published in full it will be here repeated: "The facts in this case, practically undisputed, are, that on the 25th day of January, 1913, appellant's railroad extended through the Village of Ullin, a town of from nine hundred to one thousand population, from the north to the south and about the center of the village north and south was appellant's depot, on the

east side of the tracks fronting west towards its tracks. The track next the depot known as northbound track, the second track from the depot the southbound track; third track from the depot the passing track and the fourth track from the depot house track.

There is no street across the right of way, east or west, nearer than two hundred feet south of the depot, and another street two hundred fifty feet south of this one. That immediately west of the house track and extending south past the northeast corner of the depot, is a cattle pen; on the right of way of appellant immediately north of the cattle pen, and about twenty-five feet north of the depot, is a cinder walk from the street, running north and south on west side of right of way, and extending east on right of way to west side of passing track. The cinders to build this walk were furnished by appellant and constructed under directions of village authorities several years ago, and used since by pedestrians. Immediately north of this cinder walk is a coal shed. The walk, or traveled way, as described in the declaration, is between the coal shed and cattle pen on the right of way of appellant. There was no filling in between the rails of the passing track, switch or southbound track, or between southbound and northbound tracks. Extending north from depot to opposite this cinder path appellant had constructed a board platform. The passing track was used for storing cars and this cinder path was frequently blocked with such cars. It was at times opened up by appellant at the request of authorities. There were cars standing upon it at the time of the accident and for an opening at that time a person crossing would travel about two cars length, south."

Three freight trains going south passed through Ullin on the morning in question, between 5 and 7 o'clock. The first two were through trains, the first one passing at from 5:30 to 6 o'clock and the second and third a little later. "The deceased, Johnston, on

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the morning in question, a man of about sixty years of age, and living about two hundred fifty feet northwest from the depot, left his residence at about 5:30 o'clock with a lantern to go to his place of business on the east side of the track. His usual way across the right of way was over the cinder path and by the depot. Aside from the loss of an eye, he was a strong healthy man for his years, and had as members of his family at the time, his wife, one son, one daughter unmarried, one daughter married, wife of appellee, and one grandchild. His business was operating a hoop factory from which business he had an income of about \$1,000 per year. It is the contention of appellee that deceased was killed by the first train going south that morning, in charge of engineer Briggs. The witnesses differ as to the time this train went through and the time Johnston was found lying on the west side of the southbound track, from eight to forty-five feet south of the cinder path. Some of the witnesses make it as early as 5:30, and some as late as 6:30 a. m., but the weight of the evidence tends to show that it passed through before 6 o'clock; that this train was running without a headlight, at a speed of twenty-five to forty miles per hour, and some of the witnesses say it was dark, or just breaking daylight, and foggy. It appears from the evidence that the principal injury received by the deceased was upon his hip and caused a hole to be made therein, which appellant contends could not have been made by the train."

The theory of appellee in the trial of this case is, that the deceased was killed by reason of the wilful, wanton and reckless management by appellant's servants of the train which struck the deceased and killed him. The appellant contends that the evidence is not sufficient to warrant a verdict and that the court committed several errors in the trial of this case. The first error assigned is upon the refusal of the court to discharge the jury after two of plaintiff's witnesses

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had been examined, for the reason, that the case had been conducted by James Lingle, Wall and Martin as attorneys for appellee during the selection of the jury and that after the jury had been selected one C. S. Miller, an attorney of Mound City, also appeared as attorney for the plaintiff, and that he had a blood relative and a close personal friend upon the jury. It does not, however, appear from the affidavit how closely related they were. Upon the presentation of this affidavit motion was made to discharge the jury. Immediately upon the making of the motion C. S. Miller announced to the court that he would withdraw from the case, and did so, and thereupon the court overruled the motion. We think that the matter of discharging the jury was purely in the discretion of the court, unless such facts were presented as to show an abuse of this discretion, and we see nothing in this affidavit and the action of the court to indicate an abuse of discretion, and the court did not err in overruling the motion. "Whether the trial court will grant leave after the trial of the case is entered upon, to withdraw a juror and continue the case, rests in the sound discretion of the trial court, and the ruling of the trial court in such case will not be reviewed by the Appellate or Supreme Court, except in case of great abuse." *Crane v. Blackman*, 100 Ill. App. 565; *Morrison v. Hedenberg*, 138 Ill. 22.

It is next urged that an error was committed in permitting the testimony of the deceased witness Flowers to be read to the jury. Flowers was a witness upon the former trial and at the time of the present trial was deceased. The reporter took his testimony in shorthand at the former trial and transcribed it and it was incorporated in the bill of exceptions, and during the present trial, after proof of the decease of the witness, the reporter was placed upon the stand and testified to having taken his testimony at a former trial and that he transcribed the testimony and that

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it was, to the best of his knowledge and belief, true and correct, and that his notes had been accidentally burned. It is contended by appellant that this was a reading from the bill of exceptions and was within the prohibition laid down in the case of *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 318. We do not think this point is well taken as in that case they read from the bill of exceptions without making any proof as to the correctness of the testimony. In this case proof was made that the transcript contained the testimony of the witness Flowers, and we think that the reporter, in effect, testifies that these were the statements of the witness upon the former trial, and that the court is fully sustained in its ruling by the cases of *Luetgert v. Volker*, 153 Ill. 387; *Hereford v. People*, 197 Ill. 222.

It is next insisted that the verdict is manifestly against the weight of the evidence. We think that the evidence in this case at least tends to show that on the morning in question it was dark, or at least not light, and foggy and that the train was running at a high and dangerous rate of speed, without a headlight, through a populous village, in a reckless manner. That the deceased was traveling over appellant's road at or near the usual place to which pedestrians had been accustomed to use in passing over the road, and while there is no evidence directly showing that he was right upon the traveled way, yet there is some evidence tending to show a scraping of the cinders such as might be done by the pushing of a body or anything of that character, very near this traveled path, together with the habits of the deceased, and other circumstances from which the jury would be warranted in finding that he was struck at this place, besides it also appears that this crossing was very close to the depot and that it was used by many people in passing from one side of the town to the other, and to such an extent as would require the appellant to operate its trains through this place in a reasonably

careful manner and not in a reckless one as this was operated.

It is also said that as there were no bones of the body broken but simply a hole found in the hip of the deceased, that there was not sufficient proof that he was struck and killed by the engine but that he might have been killed by a foot pad. We cannot say that such facts were developed upon the trial of this case as to warrant this court in saying that the jury was manifestly wrong in finding that the deceased was killed by a train of appellant and shall not undertake to say so. This was a question of fact for the jury and we are not disposed to disturb their finding upon this fact.

It is next insisted that the evidence does not sustain the allegations of the declaration. In this, that the declaration alleges that deceased was traveling along and upon said traveled way and while he was so traveling across the railroad he was struck and killed by a locomotive engine of appellant. In fact the question of the traveled way and that the deceased was on it when he was struck was the gravamen of the charge and the evidence wholly failed to establish this charge. This too, was a question of fact which the law has placed in the hands of the jury to determine, and while it is true, as contended by counsel for appellant, that the evidence shows that upon the track west of this and at the termination of the cinder path, there were cars standing on the cinder track, yet there is nothing to show he did not pass around these cars and back to the usual traveled route, and as above stated there were some indications as shown by the witnesses that the cinders were disturbed, from which the jury could reasonably infer that he was caught at this traveled way. Many authorities have been cited in support of this contention, that there was a variance. While it is true that in some cases the courts have gone to the extreme in holding that the averments must be proven

exactly as alleged in the declaration, but these cases are very few and the greater weight of authorities is that if the allegation is proven substantially in the manner alleged in the declaration that this is sufficient.

In appellant's fifth instruction this question was submitted directly to the jury when it was told that unless the deceased, "Was struck while walking upon a certain traveled way" that you must find the defendant not guilty. We think this was a question of fact for the jury. That it was submitted fully and fairly to the jury by appellant's instruction and that the jury by its verdict must have determined that he was upon the traveled way at the time he was struck. We are not disposed to hold in the face of this finding that the allegations of the declaration were not proven.

It is next insisted that Johnston was a trespasser and under the facts proven there could be no recovery. Several cases have been referred to where the court has held persons to be trespassers, and with the holding of the Supreme Court in the several cases referred to we have no complaint but upon an examination of each and every case it will be found that there were some peculiar circumstances surrounding the case that warranted the court in saying that the parties were trespassers but we do not think such circumstances exist in this case. Counsel for appellant insist that this court erred in its former decision herein in holding that Johnston was in a place where he had a right to be, and that the evidence as to the use of this traveled path was improperly admitted. We see no reason to change our views in this matter and still adhere to what was said in the former opinion wherein the court said: "In the case before this court evidence was offered as to the locality, streets and cross streets, location of depot, and acts of the company in the building of the cinder walk, tending to prove that the traveled way was by the company's invitation, which, if established by a preponderance of the evidence

would entitle the deceased to treatment by the company of a person rightfully on this path, and under the authorities and from a consideration of this record, that evidence was properly admitted.

It is next urged that the contention that Johnston was rightfully upon the tracks was not proven. There was evidence and admitted facts which tended to prove he was rightfully on the tracks, or, qualifying this statement somewhat, "where the company might reasonably expect persons to be." This traveled way was connected with the depot platform and was used by the people not only in passing from one part of the town to the other but in reaching the depot platform, and we do not believe that the conditions there existing were such as to warrant the appellant in regarding such persons as were at or near this traveled way as being trespassers. The appellant in operating its trains was bound to know that persons were liable to congregate or travel across the road at this place, and that it had no right to operate its trains without a headlight and at a time when it was dark and foggy at a high and dangerous rate of speed, as the evidence here tends to show it did do. Counsel for appellant have quoted quite extensively in their brief from the case of *James v. Illinois Cent. R. Co.*, 195 Ill. 327; and *Illinois Cent. R. Co. v. O'Connor*, 189 Ill. 559. We do not regard these cases as controlling the case now under consideration. In the *James* case, *supra*, the court expressly says that, "She attempted to cross the tracks in a place where nobody was invited to cross and where she had no business to be"; and in the *O'Connor* case, *supra*, it is said by the court that it is not shown that the act of the defendant therein was wilful or wanton; that such circumstances did not exist as to constitute wilfulness or wantonness. We believe, however, that in the case at bar that under the evidence the deceased was invited and permitted to cross the tracks at this place and that it was at such a

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populous place as required care upon the part of the servants of appellant in operating the trains through the village. "Upon the right of way of the railroad where the public are not invited or authorized to go for the transaction of business with the railroad company, those in charge of the train must have knowledge both of the presence of the trespasser and of his dangerous situation, but depot grounds and platforms provided by the railroad company for the use of the public in the transaction of its business, where persons have a right to be for legitimate purposes and where they may reasonably be expected, are quite different. * * * 'The fact of general use by the public of a track, so as to create a probability of their presence, might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury.' Considering alone the evidence offered by the plaintiff, it would justify an inference of such a reckless disregard of the safety of persons who might be on the cross-walk and platform at the depot as would amount to wanton and wilful conduct, and on that ground the court did not err in submitting the issue to the jury.' *Neice v. Chicago & A. R. Co.*, 254 Ill. 595. And in a later case the Supreme Court has said: "It has been held by this court, and almost universally, that the law casts no duty upon a railroad company to keep a lookout for trespassers on its tracks in the open country, remote from public crossings, cities and towns. This is conceded and requires no citation of authority. Exceptions to this general rule are (1) places where the railroad company has permitted the public to travel along or over its track for a considerable period of time and a considerable number of people have availed themselves of such use, and (2) where the railroad runs through populous portions of a city, where people frequently go upon or pass over the track with knowledge of the company or for such a length of time that the

company is chargeable with knowledge." *Joy v. Chicago, B. & Q. R. Co.*, 263 Ill. 465.

We think that the court was warranted in submitting to the jury for its determination the question as to whether or not the appellant was guilty of wilful and wanton conduct in the operation of this train, and the jury having found that it was guilty of such conduct we are not disposed to disturb such finding.

The exception taken to the improper argument is without merit. The attorney in the argument simply stated if this man was indicted for murder and the evidence should be the same as here, he could not escape. This was simply a matter of presenting his view of the conclusiveness of the evidence, and while the statements made by Mr. Wall wherein he is charged to have said "poor Bice, commonly known as Burrhead Bice," are not of a character to be commended, yet we are unable to say that they are erroneous.

It is also urged that the damages are excessive. The evidence shows the deceased to have been quite a capable man and of the age of about sixty years, industrious, with an earning capacity of about \$1,000 per year and we can see nothing in this record, nor has anything been pointed out, that tended to show the jury were inflamed by passion or unduly prejudiced or that anything occurred during the trial that was calculated to inflame the minds of the jury, and unless something of that character is shown to exist, under the repeated decisions of this and the Supreme Court, the question of the amount of damages was for the determination of the jury. We can see no reason in this case for pronouncing the verdict so excessive as to require a reversal on that account. It is next urged that the court erred in giving of instructions for appellee and in the refusal of instructions for appellant.

The objection urged to appellee's fourth given instruction is that it defines negligence when the ques-

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tion of negligence was not involved in the case. The criticism is well taken but the error is not of such character as in our opinion to affect the result of the case.

It is next urged that the court erred in giving appellee's instruction No. 8, in this, that: "Appellant by this instruction was deprived of its defense that Johnston was a trespasser." By this instruction the jury were required to find that the train was operated in a wilful and wanton manner as defined in the instructions given in the case. This required a consideration of the speed, condition of lights, place where accident occurred and all of the surrounding circumstances, and when all were considered, if the act was wilful and wanton, then the fact that he was a mere trespasser as pointed out in this opinion would not relieve defendant of its responsibility; the question of the position of deceased was an element to be taken into consideration in determining whether or not the act was wilful and wanton.

Instructions Nos. 5 and 9, given on behalf of appellant, advised the jury that to create a liability the deceased must have been struck at the traveled way. We do not believe that the criticism upon these instructions are well taken. It is urged that the court erred in refusing appellant's third and fourth refused instructions, which advise the jury that the allegation of due care was material because it had been alleged and should have been proven. This allegation was not in fact material under the count of the declaration on which the case was tried, and appellant was not entitled to an instruction directing a verdict for the defendant for want of proof of an immaterial matter.

The proposition contained in refused instruction No. 4 is covered by other given instructions for appellant.

The refused instruction No. 7, complained of, is given in substance in appellant's ninth instruction.

There are a number of other refused instructions to

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which attention is called in a general way, but the propositions covered by all of these instructions have been determined by the court in this opinion, or they have been given in other instructions, so that we do not deem it necessary to comment upon each instruction separate.

The instructions taken as a whole, in our judgment, presented the law governing this case fairly and fully to the jury and we can see no reason for complaint upon the instructions.

After a careful consideration of this record, we are not able to say that the court committed any reversible error in its rulings, or that the verdict of the jury was manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

Judgment affirmed.

Lake Temple by S. C. Temple, Appellee, v. Alton, Granite & St. Louis Traction Company, Appellant.

(Not to be reported in full.)

Appeal from the City Court of Alton; the Hon. JAMES H. DUNNEGAN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Lake Temple, by S. C. Temple, his next friend, plaintiff, against the Alton, Granite and St. Louis Traction Company, defendant, for damages for personal injuries sustained as a result of a collision between an automobile which plaintiff was driving and defendant's street car. From a judgment for plaintiff, defendant appeals.

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The first instruction for plaintiff was as follows: "The court instructs the jury that if you believe from all the evidence in this case that the plaintiff was exercising all due care and caution for his own safety and the safety of others at the time of the injury complained of, or if you further believe from all the evidence in the case that the defendant through its servants so operating an electric car was careless and negligent at the time and place, namely, the intersection of Second and Ridge streets, so as to cause the aforesaid injury, if you believe the plaintiff was injured, then your verdict should be for the plaintiff in such amount as you may believe from the evidence he is entitled to receive, not to exceed \$5,000, the amount claimed in the declaration."

The court further instructed the jury: "And if you further believe from the evidence that the defendant failed to give the required signal in approaching said crossing by ringing a bell or sounding a gong, and that such failure contributed to the accident, then your verdict should be for the plaintiff in such an amount as you believe from the evidence he is entitled to receive, not to exceed the amount claimed in the declaration."

WILLIAMSON, BURROUGHS & RYDER, for appellant.

B. J. O'NEILL, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 140*—*when instruction authorizing recovery for negligence not charged in declaration erroneous.* In an action against a street railroad for damages for personal injuries sustained as a result of a collision between an automobile driven by plaintiff and defendant's street car, in which the declaration

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alleged negligence, in operating the car at a high rate of speed and in failure to sound a bell, an instruction that the plaintiff could recover if the jury believed that the defendant operated its car in a careless and negligent manner, *held* erroneous as not confined to the negligence charged in the declaration, since there was evidence that the car was operated without a headlight, and the jury might find that the defendant was negligent in this respect.

2. DAMAGES, § 209*—*when instruction erroneous because not limiting damages to compensatory amount.* In an action against a street railroad for damages for personal injuries sustained as a result of a collision between an automobile driven by plaintiff and defendant's street car, an instruction that if the plaintiff was entitled to recover the verdict should be for such sum as the jury might believe from the evidence he was entitled to receive, not exceeding the amount stated in the declaration, *held* erroneous as not limiting the damages to a compensatory amount.

3. STREET RAILROADS, § 146*—*when instruction erroneous because allowing recovery for act not proximate cause of injury.* In an action against a street railroad for damages for personal injuries sustained as a result of a collision between an automobile driven by plaintiff and defendant's street car, an instruction that if the jury believed from the evidence that the defendant failed to give the required signal upon approaching the crossing by ringing a bell or sounding a gong and that such failure contributed to the accident, *held* erroneous as allowing a recovery for an act of negligence which was not the proximate cause of the injury.

4. NEGLIGENCE, § 47*—*necessity that negligence be proximate cause of injury.* It is not sufficient to create a liability for negligence that the act contributed to the injury, but it must have been the proximate cause of the injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Toledo, St. Louis & Western Railroad Company, Plaintiff in Error, v. East St. Louis & Suburban Railroad Company, Defendant in Error.

1. APPEAL AND ERROR, § 1491*—*when exclusion of evidence reversible error.* In an action to recover for breach of a contract between railroads providing that defendant should have the right to cross the tracks of plaintiff at grade but should before crossing "flag" such crossing, the exclusion of parol evidence that the term "flagging" as used in the contract had a special meaning, held reversible error.

2. CONTRACTS, § 198*—*when evidence admissible to explain the word "flagging."* The term "flagging" as used in a contract between railroads with reference to the right of one railroad to cross the tracks of the other at grade is of a character requiring explanation of its special meaning as so used.

3. CONTRACTS, § 198*—*when evidence competent to explain meaning of words.* Parol evidence is competent to explain not only the technical words of art or science, but also words and phrases having a local or special meaning in a particular calling, trade, business or profession.

4. EVIDENCE, § 319*—*when evidence as to meaning of words does not tend to contradict or vary instrument.* Parol evidence that words used in a written instrument have a technical or special meaning as so used does not tend to contradict or change the instrument.

5. CONTRACTS, § 181*—*how intention of parties to instrument containing technical terms ascertained.* Evidence of a technical or special meaning of words used in a written instrument is the only method of ascertaining the intention of the parties in entering into the agreement, the presumption being that such terms were used according to their understood meaning in the place or business with reference to which the contract is made.

6. CONTRACTS, § 197*—*when presumed parties made contract with reference to business customs.* One entering into a contract in the ordinary course of business is presumed to have done so with reference to any existing general usage or custom relating to such business.

7. EVIDENCE, § 403*—*who should explain words having special meaning.* Where a term used in a written instrument has a special meaning of which people living in one place have a better knowl-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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edge than those living in another place, it is necessary that the term be explained by those having the better knowledge of its meaning.

8. EVIDENCE, § 154*—*what constitutes an admission that meaning of term is doubtful.* In an action to recover for breach of a written contract, a party impliedly concedes that the meaning of a term used therein is doubtful by offering evidence tending to show the meaning of such term, without showing that plaintiff knew of or acquiesced in the offer.

9. EVIDENCE, § 403*—*when testimony of experts admissible to explain term "flagging a crossing."* In an action to recover for breach of a contract between railroads providing that defendant should have the right to cross the tracks of plaintiff at grade, but before crossing should "flag" such crossing, testimony of expert witnesses held proper to explain what was understood by railroad men by the term "flagging a crossing."

10. INSTRUCTIONS, § 115*—*when instruction erroneous as presenting false issue to jury.* In an action to recover for breach of a written contract between railroads providing that defendant should have the right to cross the tracks of plaintiff at grade on certain conditions, in consideration of which it should indemnify plaintiff for loss sustained "by reason of the condition of the crossing or by the failure" of defendant to comply with the requirements of the contract, where the act relied on as breach was the failure of defendant to indemnify plaintiff for a judgment recovered against it for personal injuries sustained in a collision at such crossing between a train of plaintiff and a car of defendant, an instruction that plaintiff could not recover if the proximate cause of the accident was the negligence of plaintiff without reference to the conduct of defendant, held to present a false issue to the jury, the issue being whether defendant had complied with its contract, and there being no issue as to the negligence of either party.

11. CONTRACTS, § 393*—*how jury should be instructed in action for breach of contract.* In an action to recover for breach of a written contract, it is necessary to present to the jury fully and fairly the issue whether defendant has complied with the contract, with a proper interpretation of the terms used in the contract, where such terms are of the character to require such interpretation.

Error to the City Court of East St. Louis; the Hon. W. M. VANDEVENTER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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C. E. POPE, for plaintiff in error; CHARLES A. SCHMETTAU, of counsel.

BARTHEL, FARMER & KLINGEL, for defendant in error.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

This action was commenced by the plaintiff in error, hereinafter called the plaintiff, against the defendant in error, in assumpsit, upon a contract entered into between plaintiff and the Mississippi Valley Transit Company, assignor of the defendant. Judgment was obtained against the plaintiff for costs and it prosecutes this writ of error.

The agreement referred to was made on the 7th of October, 1901, and provided by its terms that it should be binding upon the parties thereto, their successors and assigns, and the defendant is the assignee of the Mississippi Valley Transit Company. The contract was entered into for the purpose of permitting the Mississippi Valley Transit Company and its assigns to cross plaintiff's right of way and tracks on the line of the first public highway crossing west of Edwardsville. There are several provisions in the agreement but only such of them as are in question here will be given.

Section 4 provides "that the second party shall bring all of its cars to a stop before attempting to cross the tracks of the said first party, and said cars shall remain standing until the conductor in charge of said car of the second party flags said crossing."

Section 5. "The trains of the party of the first part shall have the right of way at all times over the said crossing in preference to any cars or trains of the party of the second part, and the party of the second part agrees to adopt such regulations for the passage of the crossing by the cars as the party of the first part may demand and approve."

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Section 7. "The party of the second part assumes full responsibility for the proper maintenance and operation of the crossing, and will indemnify and save harmless the said party of the first part, its successors and assigns, against all loss, damage, costs, expenses, actions, claims or demands whatsoever which it or they may at any time suffer or be subject or liable to by reason of the condition of the crossing or the failure of the said second party to flag, as provided for in section 4 of this contract."

Section 8. "It is the intent and meaning of this contract that the operations of the railroad of the party of the first part are not to be hampered or inconvenienced by the operations of the party of the second part, and all expenses incidental to maintaining and operating the said crossing is to be at the sole expense of the party of the second part."

The party of the first part mentioned in said agreement is plaintiff in this suit and the party of the second part is the assignor of defendant.

It appears from the record in this case that about eight o'clock of the night of April 20, 1911, one Anna Perenchio became a passenger upon defendant's car and when the car approached plaintiff's railroad it stopped within about ten feet of the railroad and the conductor of defendant went upon plaintiff's railroad and then signaled the motorman of defendant's car to cross over and while crossing over the car stopped suddenly and was detained from one to two minutes and while on the track a freight train backed up against the car and injured Anna Perenchio.

There is some dispute as to the conditions at the time defendant attempted to cross the railroad. The conductor of defendant's car says that when he went upon the railroad track he saw no car or train on the track. There are two witnesses or more who testified

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that he stated that he saw the freight train backing up but thought he could pass over before the freight train reached the crossing. This conversation is denied by the conductor. There is a conflict in the testimony, also as to whether or not there was a brakeman upon the rear car, and as to whether they had lanterns. Anna Perenchio thereafter brought suit against the plaintiff and obtained a judgment against it for the amount of \$6,500 which was paid by the plaintiff and the plaintiff now seeks to recover this amount from the defendant under the contract above set out.

There are several counts in the declaration filed by the plaintiff herein but they are all based upon the sections of the contract above set forth. The first count alleged as a breach that the defendant drove the car on the tracks of the plaintiff without flagging said crossing in accordance with the terms and provisions of said agreement, while a certain engine and cars of the plaintiff were then in motion and approaching said crossing. The second count alleges that it became and was the duty of the defendant to cause said crossing to be flagged and ascertain before attempting to drive its said car across plaintiff's tracks that it could do so in safety and not in any manner hamper or inconvenience plaintiff by the operation of said car, and then avers that it drove said car on said crossing in front of a moving train. The sixth count is, in substance, the same as the first. The seventh count alleges that plaintiff had the right to pass over said crossing without being hampered and impeded by the cars of the defendant, and that the servants of the defendant drove such car upon the tracks of plaintiff without flagging said crossing in accordance with the terms and provisions of the said agreement, and without the engineer or motorman in charge of the engine or motor of said car first having positively ascertained

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that the way was clear, and that the said car of the defendant might proceed in safety.

It is the contention of plaintiff that in order to flag said crossing in compliance with the provisions of said agreement, it became necessary to stop the car and for the conductor or motorman to pass upon plaintiff's track and ascertain positively that no train was approaching and that it could with safety pass over plaintiff's tracks before attempting to do so.

During the progress of the trial the plaintiff contended that the word "flagging," as used in said contract, had a special meaning as applied to a contract between a steam railroad and an electric road when used in this connection, and offered to prove by Edward C. Kramer who claimed that he knew the meaning of that term under such conditions, and that for the last seventeen years he had had occasion as attorney to examine, prepare and pass upon crossing contracts, and after stating that he knew the meaning of that term as applied to such contracts he was asked to state to the jury what it meant, which was objected to by defendant, the objection sustained, and then plaintiff stated that he wished to prove by this witness that the term "flagging" as used in the contract in question means that the conductor or other person in charge of such electric car shall go out upon the tracks and look both ways and ascertain if he can with safety permit his car to cross the tracks; that it is his duty in order to properly flag the crossing to positively ascertain whether or not trains are approaching in either direction on the railroad track. To this offer the objection was sustained and the plaintiff excepted. We are of the opinion that the refusal of the court to permit this term to be explained to the jury is reversible error. It appears from the statement of the witness that it has a special meaning when applied to matters of the character involved in

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this suit, and it seems to us that it is that character of a term that would require explanation. It is said by the Supreme Court of this State: "The testimony of witnesses is admissible to explain not only technical words of art or science, but words or phrases having a local meaning or a special meaning in a particular calling, trade, business or profession. Such evidence does not contradict or change the written instrument. The presumption is that such terms were used according to their understood meaning in the place or the business with reference to which the contract is made, and evidence as to such meaning is the only method of ascertaining the intention of the parties in entering into the agreement." After citing several authorities the court further says: "A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business." *Steidtmann v. Joseph Lay Co.*, 234 Ill. 88. The position of counsel for defendant is, that the language of the contract itself is sufficiently defined to indicate what it means and, if not, the proper interpretation would be the interpretation the parties themselves have put upon it during the ten years it has been in force. He also urges as a reason: "That flagging the crossing, especially in St. Clair County, from which the jury was drawn, is a very common and well known performance. This case was tried in East St. Louis, into which city no one can ride on an electric car without seeing a crossing flagged two or three times." If the term is of the character that the people who live in St. Clair County would have a better knowledge of its meaning than other people then it would seem necessary for an explanation of the terms by those who had knowledge of such things. Before the trial closed, the defendant itself conceded, at least to some extent, that its meaning was doubtful for it offered

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to show how the parties themselves had interpreted this term by placing the motorman and a number of other witnesses upon the stand and asking them what had been the practice for several years last past with reference to flagging a crossing. This offer was made without showing any knowledge or acquiescence of the plaintiff therein, and the objection was sustained and no error has been assigned thereon. It was held that it was proper to permit expert testimony as to what was the meaning by "necessary switchmen and signals." *Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 457. Also that the testimony of expert railway men was competent to explain and define what was meant by the term "yard" in connection with the operation of railroads. *Garrity v. Catholic Order of Foresters*, 148 Ill. App. 194; and many other cases have been cited and referred to where the meaning of the terms was less doubtful, in our opinion, than the meaning of the term here sought to be interpreted, and it seems to us that it would be highly proper to permit expert witnesses to explain what was understood by the railroad men with reference to the term "flagging a crossing."

It is also contended that the court erred in the giving of defendant's first instruction, which is as follows: "The court instructs the jury that if you believe from the evidence that the sole and proximate cause of the accident or collision complained of in this case was the failure of the plaintiff, through its agents in charge of its train, to exercise due care in the management and handling of such train, then you should find the issues for the defendant, East St. Louis & Suburban Railway Company." It will be observed that this instruction directs a verdict and bars the plaintiff from a recovery herein if it was guilty of negligence and due care in the management and handling of such train, without reference to the

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conduct of the defendant. The issue to be tried in this case is not "Was the plaintiff negligent" but "Has the defendant complied with its contract"? And if the defendant has complied with its contract then the plaintiff cannot recover whether it was ever so careful or ever so negligent. We agree with counsel that this instruction presented a false issue for the jury to try. All that the defendant had to do to relieve itself of responsibility was to show that it complied with its contract by flagging the crossing.

We do not believe that this case has been tried upon the issue as presented by the pleadings and that it was necessary and proper to present to the jury fully and fairly the question as to whether or not the defendant had fairly complied with its contract, under a proper interpretation of the terms thereof, where said terms are of the character to require such interpretation.

On account of the errors made by the trial court in the exclusion of the evidence and giving of the instruction referred to, we are of the opinion that there should be another trial, and the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

E. B. Sipes, Appellee, v. John Barlow, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Williamson county; the Hon. CARL E. SHELDON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by E. B. Sipes, plaintiff, against John Barlow, defendant, in the Circuit Court of Williamson county, to recover on a verbal contract whereby plaintiff agreed to move certain houses for defendant. From a judgment for plaintiff for two hundred dollars and costs, defendant appeals.

Plaintiff's declaration averred a contract with defendant made May 29, 1914, whereby plaintiff agreed to move two frame houses for two hundred and fifty dollars, defendant agreeing to place a foundation under the larger house within one week after the house was placed in position by plaintiff, and not to require plaintiff to keep moving tools under the house after such time. Plaintiff alleged that he moved the houses within a reasonable time, but owing to the failure of defendant to place the foundation as agreed, plaintiff could not secure his moving tools until July 27, 1914, and that defendant refused to pay the two hundred and fifty dollars. Plaintiff also alleged special damages to the amount of seven hundred and fifty dollars by reason of profits lost on another contract by reason of not having the tools. Defendant pleaded not guilty, with a special plea averring unskilful and negligent work by plaintiff, damaging one of the houses to the extent of one hundred dollars, and that defendant was damaged to the extent of fifteen dollars by plaintiff's failure to perform certain labor in excavating a basement as agreed.

Plaintiff's evidence established that defendant and plaintiff entered into an oral contract to move two frame houses owned by defendant. Plaintiff agreed to move the houses as they then stood for the sum of two hundred and fifty dollars. It also appeared that it was desirable that a room be taken off of the large house to facilitate moving, and it was agreed that if defendant would detach the room plaintiff would move the buildings for two hundred dollars; but if plaintiff had to detach and remove it, or move the building with the room attached the price would be two hundred and fifty dollars. It was stipulated that plaintiff would not be liable for any damage to the building, and that under the contract defendant was to build a foundation under the large house within ten days from the time plaintiff had placed it in position so that plaintiff could remove his house moving tools from under the building. The houses were moved and the latter of the two houses placed in position on May 29, 1914. Repeated demands were made by plaintiff for the tools but they were not obtained until about the 27th of July following. It further appeared that at that time plaintiff had a contract with one Davis to move a house for five hundred dollars and that because of defendant's failure to release the moving tools plaintiff had to procure the assistance of another house mover, with his tools, in the moving of the Davis house, and that by reason of this he lost profits to the amount of one hundred and twenty-five dollars or more.

Defendant's evidence tended to prove that plaintiff agreed to move the houses for two hundred dollars if the room was detached but if not detached he was to have two hundred and fifty dollars for moving it. Plaintiff agreed to detach the room or ell himself if permitted so to do, and move the house for two hundred dollars. Defendant denied agreeing to place a foundation under the second house moved and denied that the stipulation that plaintiff was to be exempt

from liability for damages caused by the moving of the houses but said that plaintiff agreed to move the houses without damage and leave them in as good condition as he found them. The evidence of defendant tended to prove that the houses were damaged, the plastering cracked, chimney injured, and that one of the houses was otherwise twisted and damaged to the amount of seventy-five dollars. It also appeared that plaintiff agreed to assist in digging the basement under the house as part of the consideration under this agreement, which he failed to do; and further tended to show that defendant incurred additional expense amounting to about seventeen dollars in procuring materials to remedy the injury caused by plaintiff's failure to properly care for and support the houses in the removal.

It appeared from the testimony of the plaintiff that some time in the month of July he had a conversation with defendant in which he says defendant offered to pay him two hundred dollars, by check, for that amount. This is denied but the defendant testified that in this conversation: "He claimed that I owed him two hundred and fifty dollars. I claimed that I owed him two hundred dollars." This declaration was made prior to the commencement of the suit and before either of them had figured upon any extras that they might demand of each other.

DENISON & SPILLER, for appellant.

PILLOW & STONE, for appellee; J. L. HARMON, of counsel.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

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Abstract of the Decision.

1. TRIAL, § 155*—*when province of jury to determine facts.* Where the evidence is conflicting it is for the jury to determine what facts are proved thereby.

2. CONTRACTS, § 61*—*when evidence of loss of profits inadmissible.* In an action to recover on a contract for moving houses, where it appeared that defendant breached the contract by failing to build a foundation under the houses as agreed so that plaintiff could remove his moving tools, evidence of profits lost by plaintiff on another contract as a result of not having his tools held erroneously admitted, the evidence admitted not being competent, as the damages sought to be proved thereby were speculative and not proper elements of damages in the action.

3. DAMAGES, § 66*—*what is measure of damages for breach of contract to move houses.* In an action to recover for breach of a contract for moving houses where it appeared that defendant breached the contract by failing to build a foundation under the houses as agreed so that plaintiff could remove his moving tools, the measure of plaintiff's damages is the value of the use of the tools for the time during which plaintiff was deprived of such use.

4. DAMAGES, § 61*—*when prospective profits not recoverable.* Prospective profits are too remote and speculative to be the measure of damages in actions for breach of contract, such damages being conjectural and misleading, and their realization being subject to many uncertain contingencies.

5. EVIDENCE, § 154*—*when declaration constitutes admission of liability.* In an action to recover for breach of a contract for moving houses, a declaration made by defendant prior to any controversy arising from the contract that "he claimed that I owed him two hundred and fifty dollars; I claimed that I owed him two hundred dollars," held to be a clear admission by defendant that he owed plaintiff two hundred dollars.

6. EVIDENCE, § 160*—*when declaration not statement in effort to compromise.* In an action to recover for breach of a contract for moving houses, a declaration made by defendant prior to any controversy arising from the contract that "he claimed that I owed him two hundred and fifty dollars; I claimed that I owed him two hundred dollars," held to be an admission of an independent fact and not a statement made in an effort to compromise, although such statement was made when plaintiff visited defendant to obtain a settlement, it appearing that the differences between the parties were not sought to be adjusted at such time, nor was any effort then made by either party to compromise.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. EVIDENCE, § 160*—*when offer of compromise not competent.* Offers by way of compromise are not competent against the party making the offers.

8. EVIDENCE, § 160*—*when evidence of admission of independent fact competent.* Evidence tending to prove the admission of an independent fact is competent although the admission is made in an effort to compromise or settle differences, unless expressly stated to be made without prejudice or in confidence.

9. NEW TRIAL, § 5*—*when refused because of admission of liability.* A new trial will not be granted although there was error in the proceedings of the trial court where the record shows that defendant admitted that he owed plaintiff a sum exactly equal to the amount of the damages assessed by the verdict.

10. APPEAL AND ERROR, § 1401*—*when verdict not disturbed on review.* Where substantial justice has been done by a verdict, the Appellate Court has no right to disturb the verdict on review, although there was error in the proceedings in the trial court.

Fred Kleet, Appellee, v. Southern Illinois Coal & Coke Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Williamson county; the Hon. CARL E. SHELDON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

Statement of the Case.

Action by Fred Kleet, plaintiff, against the Southern Illinois Coal & Coke Company, defendant, in the Circuit Court of Williamson county, to recover for personal injuries. From a judgment for plaintiff for five hundred dollars and costs, defendant appeals.

The first count of the declaration charged that it was the duty of the defendant to exercise ordinary care to provide plaintiff with a reasonably safe mule

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to drive, and that the defendant negligently provided him with an unruly, ungovernable and dangerous mule, in this, that the mule could not be safely handled by the driver on account of his disposition, and was likely to injure plaintiff by suddenly turning into rooms or crosscuts along said entry; that the defendant knew or by the exercise of ordinary care for plaintiff's safety could have known of the disposition of the mule, and would also have known of the danger to plaintiff of driving said mule by reason thereof. That defendant prior to the 28th day of May had elected not to provide and pay compensation under the Compensation Act, which is set forth in substance in the declaration; and had prior to said date filed notice of such election with the Industrial Board of the State of Illinois, and had not on said date withdrawn said notice. And then alleged in consequence of such election that defendant was deprived of the defenses specified in the statute.

The second count of the declaration alleged the same conditions as the first, and the same disposition of the mule, and then charged that the foreman of the defendant approached the mule with a large stick in his hand and began beating and striking the mule over the head with the stick and in consequence of the disposition of the mule, combined with the assault made on him by the foreman, said mule jammed plaintiff between the car and said mule, thereby breaking three ribs, etc.

The first additional count charged the furnishing of the same character of mule as set forth in the former counts, and then alleged that while plaintiff was driving the mule the foreman negligently stepped from one of said rooms and with a large stick in his hands frightened the mule, and, on account of its disposition that plaintiff was unable to control the mule and that its disposition, combined with the frightening by the foreman, caused the plaintiff to fall from his

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position on the car, and he was thereby injured. This count also made substantially the same allegation as the other counts as to the defendant having elected not to operate under the Compensation Act.

It appeared that plaintiff had for several years been engaged in driving mules in coal mines and had been at work for the defendant as a driver for several months prior to his injury. On May 21, 1914, he was given a mule to drive in what was known as the first west entry off the third south entry. He drove the mule from about 8 a. m. until about 4 p. m., when he was injured. This mule was ungovernable and had a habit of turning off of the regular line and of pulling into rooms if he saw a light in the rooms, or frequently did so. The plaintiff knew nothing about this mule or of such habits, and it was the first day he had driven it. When the mule attempted to leave the track it frequently caused the car to be derailed, and drivers were unable to restrain him by the use of lines, claiming the mule would catch the bit in his teeth so that the lines would not check or guide him. During the day plaintiff drove the mule, he had turned out several times and derailed the car, and the last time was about twenty or thirty minutes before plaintiff was hurt. Mr. Dixon, assistant mine manager, was there present, and it is undisputed that plaintiff said to him: "Joe, this mule ought to be taken off of this run, if he ain't he is going to kill or hurt some driver." After the plaintiff had described to Dixon the actions of the mule, Dixon said that he would stand at the room and keep the mule from turning into it. Plaintiff said that he ought not do that as it would cause the mule to hurt him. Later the mule again attempted to turn into a room and Dixon undertook to keep him out, and plaintiff claimed that Dixon came towards the mule with a stick when he turned in, but the mule turned out slackening the tail chain and pushing plaintiff off of the car, and in falling he

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grabbed at the spreader strap but missed it and swung under the car which ran upon him and broke three ribs and otherwise injured him. Dixon denied that he stood in the room and frightened or struck the mule, or that the mule by reason of such fright turned and knocked plaintiff under the car. He claimed that plaintiff was looking back and fell off the tail chain and was hurt.

It further appeared in this case that at the time of and prior to the day of the injury the defendant had elected not to operate its mine under the Compensation Act.

The court gave the following instruction:

"The court instructs the jury that when a coal company employs an assistant mine manager and puts him to work to assist in managing its mine, that such assistant mine manager then becomes the vice-principal of such coal company, and his acts, in the scope of his authority as such assistant mine manager, bind the company; and you are further instructed that knowledge on the part of such assistant mine manager, received by him in his capacity as such assistant mine manager, in the scope of his duties as such, is the knowledge of the company; and if you believe, from the weight of the evidence, in this case that Joe Dixon, at and before the time plaintiff received his alleged injuries, was the assistant mine manager of the defendant, and further that the mule which plaintiff was driving at the time of his injuries, was dangerous for him to drive as alleged in plaintiff's declaration, and that the said Joe Dixon knew of the dangerous disposition of said mule which plaintiff was driving, if he was dangerous, then, and in that case, such knowledge would be the knowledge of the defendant."

DENISON & SPILLER, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

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MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT, § 12*—*when declaration at common law for personal injuries sufficient after verdict.* In an action at common law to recover for personal injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, a declaration alleging that prior to the accident defendant had elected not to provide and pay compensation as provided by the statute, held sufficient after verdict without averment that the employer filed the notices required by the statute to be given of such election.

2. WORKMEN'S COMPENSATION ACT, § 12*—*what is ultimate fact to be proved in action by servant for personal injuries at common law.* In order to maintain an action at common law to recover for injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, the ultimate fact to be proved is that defendant elected not to provide and pay compensation as provided by the statute.

3. PLEADING, § 466*—*when declaration sufficient after verdict.* A declaration alleging the ultimate fact to be proved is good after verdict without other averments.

4. PLEADING, § 28*—*when should not contain evidentiary matter.* Circumstances tending to prove the ultimate fact alleged have no place in the pleadings but are to be used for the purpose of evidence.

5. WORKMEN'S COMPENSATION ACT, § 12*—*when averments as to election not to come under Workmen's Compensation Act insufficient.* In an action at common law to recover for personal injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, an allegation in the declaration that defendant filed with the Industrial Board the notice required by the statute of its election not to provide and pay compensation as provided by the statute without also alleging the posting of such notice, also required by the statute, if a necessary averment, must be regarded as an averment improperly or incompletely made.

6. PLEADING, § 466*—*when defects or omission cured by verdict.* Defects, imperfections or omissions in any pleading, whether in substance or form, which would have been fatal on demurrer, are cured by verdict where the issue joined is that necessarily required, and where proof is made of the facts defectively or imperfectly stated or omitted, without which it is to be presumed that the verdict would not have been directed or given.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. PLEADING, § 466*—*when not presumed every essential fact alleged in declaration was proved.* After verdict the intendment is that every essential fact alleged in the declaration, or fairly implied from its allegations, were established on the trial, but where the declaration does not show a good cause of action there is no room for intendment or presumption.

8. MASTER AND SERVANT, § 550*—*when declaration at common law for personal injuries sufficient after verdict.* In an action at common law to recover for injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, where the declaration alleged in general terms the election of defendant not to provide and pay compensation as provided by the statute, and where the evidence showed that defendant had performed the acts necessary to effectuate its election as required by the statute, *held* that the declaration was good after verdict although it nowhere alleged that defendant posted notice of its election as required by the statute.

9. WORKMEN'S COMPENSATION ACT, § 2*—*how filing of notice with Industrial Board may be proved.* Proof of the filing of a notice with the Industrial Board in compliance with the Workmen's Compensation Act of 1913 is sufficiently made by proving a copy of the notice filed, certified by the secretary of the board and under its seal.

10. EVIDENCE, § 122*—*how contents of posted notice may be proved.* The contents of an inscription on a wall or of a notice posted thereon may be proved by the testimony of those who read such inscription or notice.

11. WORKMEN'S COMPENSATION ACT, § 2*—*how election not to come under act may be proved.* In an action at common law to recover for personal injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, where the declaration alleged that defendant elected not to provide and pay compensation as provided by the act, *held* competent to prove such election by a copy of the notice filed by defendant with the Industrial Board, certified by its secretary and under the seal of the board, and by the testimony of those who saw the notice posted as required by the statute and by a copy of the notice made by one who saw it.

12. TRIAL, § 213*—*when instruction takes count from consideration of jury.* Where a declaration contains several counts, one of which is not supported by evidence, an instruction that there could be no recovery under the unsupported count has the effect of taking such count away from the consideration of the jury.

13. TRIAL, § 213*—*when refusal of instruction that there can be*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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no recovery on unsupported count not reversible error. Where a declaration contains several counts, one of which is not supported by evidence, it is not reversible error to refuse an instruction that no recovery can be had on the unsupported count although such refusal may be erroneous, defendant not being prejudiced thereby, since in such case the presumption is that if a verdict is found for plaintiff, it is based on the counts which are supported by evidence.

14. TRIAL, § 247*—*when verdict on one sufficient count good.* Where one sufficient count in a declaration is sustained by evidence the verdict is good.

15. TRIAL, § 247*—*when verdict on one good and one poor count sustained.* A verdict finding defendant guilty on two counts, one sufficient and the other insufficient, will not be reversed although the court gave an instruction authorizing recovery on the insufficient count.

16. APPEAL AND ERROR, § 1563*—*when refusal of instruction to disregard count not reversible error.* In an action to recover for personal injuries sustained by a miner as the result of the alleged negligence of defendant's assistant mine manager in frightening the mule which plaintiff was driving at the time of the accident, causing the mule to turn, slackening the tail chain on which plaintiff was standing, and throwing plaintiff under the car, where the declaration contained several counts, one of which alleged that defendant's foreman struck the mule, which count was not supported by evidence, the refusal of an instruction that plaintiff could not recover under the unsupported count held not reversible error, although erroneous.

17. INSTRUCTIONS, § 11*—*when meaning of terms need not be explained.* In an action for personal injuries, the terms "proximate cause" and "accident" are not so technical as to make the failure to explain in instructions the meaning of the terms necessarily error.

18. MINES AND MINERALS, § 191*—*when instruction as to knowledge of disposition of mule not erroneous.* In an action to recover for injuries sustained by a miner as the result of the vicious disposition of a mule given him to drive, an instruction relating to defendant's knowledge of the disposition of the mule examined and held not objectionable, it appearing that the instruction did not direct a verdict, and that defendant's boss driver had notice of the disposition of such mule.

19. MASTER AND SERVANT—*when plaintiff entitled to instruction as to effect of defendant's failure to accept compensation act.* In an action at common law to recover for personal injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, where it appears that defendant elected not to pro-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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vide and pay compensation as provided by the statute, plaintiff is entitled to an instruction advising the jury as to the defenses of which defendant was deprived by the statute as a result of its election.

20. INSTRUCTIONS, § 135*—*when necessary that instruction be requested.* A party desiring that the jury be instructed as to the evidence required to prove any disputed question of fact must ask for an instruction, and if he fails to do so cannot complain that none was given.

21. INSTRUCTIONS, § 154*—*when requested instruction may be modified.* It is not error to modify a requested instruction by making it more specific although the same general principle was covered by the instruction without the specific modification.

22. INSTRUCTIONS, § 151*—*when may be refused.* A party cannot complain of the refusal of instructions substantially given in other instructions.

23. MINES AND MINERALS, § 180*—*when question whether assistant mine manager frightened mule for jury.* In an action for personal injury sustained by a miner as the result of the alleged negligence of defendant's assistant mine manager in frightening the mule which plaintiff was driving at the time of the accident, the question whether the assistant manager did frighten the mule as alleged is a question of fact to be determined by the jury.

24. MINES AND MINERALS, § 173*—*when evidence sufficient to sustain verdict.* In an action to recover for personal injuries sustained by a miner as a result of the alleged negligence of defendant's mine manager in frightening the mule which plaintiff was driving at the time of the accident, causing the mule to turn, thereby slackening the tail chain on which plaintiff was standing, and throwing him under the car, a verdict for plaintiff held not manifestly against the weight of the evidence.

25. APPEAL AND ERROR, § 1410*—*when verdict sustained on appeal.* On appeal it is the duty of the Appellate Court to sustain the verdict and judgment appealed from unless it can be said that such verdict and judgment are manifestly against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative, Quarterly, same topic and section number.

**Louis Bednar, Jr., by Louis Bednar, Sr., Appellee, v.
Mt. Olive & Staunton Coal Company, Appellant.**

1. WORKMEN'S COMPENSATION ACT, § 2*—*what defenses not available as result of refusal to come under act.* The common-law defenses of assumed risk, negligence of a fellow-servant and contributory negligence are not available to an employer who has elected not to accept the provisions of the Workmen's Compensation Act of 1913.

2. WORKMEN'S COMPENSATION ACT, § 2*—*when evidence tending to show contributory negligence admissible in mitigation of damages.* In an action to recover for personal injuries sustained by a servant since the enactment of the Workmen's Compensation Act of 1913, evidence tending to show contributory negligence of plaintiff is competent in mitigation of damages where the employer has elected not to provide and pay compensation as provided by the statute.

3. MASTER AND SERVANT, § 126*—*what is duty of master to furnish safe place to work.* An employer who has elected not to provide and pay compensation as provided by the Workmen's Compensation Act of 1913 owes to his employees the duty of furnishing a reasonably safe place in which to work.

4. MINES AND MINERALS, § 100a*—*what is duty of owner of mine to keep tracks unobstructed.* The owner or operator of a mine who has elected not to provide and pay compensation as provided by the Workmen's Compensation Act of 1913 owes to his employees the duty of exercising reasonable care and diligence to keep the tracks in the mine entries free from dangerous obstructions or conditions, and for breach of such duty the employer will be liable in damages.

5. MASTER AND SERVANT, § 206*—*when master liable for negligence of other servants.* The negligence of the employee is the negligence of the employer, and if injury to another employee is caused by such negligence, the employer must respond in damages, where he has elected not to come under the Workmen's Compensation Act.

6. MINES AND MINERALS, § 182*—*when negligence of master question for jury.* In an action to recover for personal injuries sustained by a mine employee since the enactment of the Workmen's Compensation Act of 1913, where the employer has elected not to provide and pay compensation as provided by the statute, and where it was alleged that the injuries sustained were the result of defendant's negligence, the question whether defendant was negligent under the evidence is a question of fact for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. MINES AND MINERALS, § 173*—*when evidence sufficient to sustain verdict in action for negligent injuries.* In an action to recover for personal injuries sustained by an employee since the enactment of the Workmen's Compensation Act of 1913, where the employer had elected not to provide and pay compensation as provided by the statute, and where it appeared that plaintiff was injured as a result of a collision between a car which he was driving in a mine and another car driven by other employees of defendant who were alleged to have disregarded a warning from the trapper not to enter on the track where the accident occurred until plaintiff's car had passed, evidence held sufficient to sustain the verdict.

8. MINES AND MINERALS, § 177*—*when evidence sufficient to prove negligence of fellow-servants.* In an action to recover for personal injuries sustained by a miner since the enactment of the Workmen's Compensation Act of 1913 where the employer had elected not to provide and pay compensation as provided by the statute, and where it was alleged that plaintiff's injuries were the result of defendant's negligence, and it appeared that plaintiff was a driver in defendant's mine and was using the track where the accident occurred in the performance of his duties, that other employees desiring to move a car on which they had loaded their tools proceeded to a trap door where the trapper informed them that plaintiff was in the entry into which such employees intended to go and requested them to wait until plaintiff came out, and that they proceeded on their way without regard to the request and collided with plaintiff's car a few feet from the door, evidence held to tend to prove negligence on the part of such other employees.

9. MINES AND MINERALS, § 126*—*when miner not bound to guard against unusual use of tracks.* A driver in a mine is not bound in the exercise of ordinary care to anticipate and guard against an unusual use of the track on which he is driving his car.

10. MINES AND MINERALS, § 135*—*when disregarding custom constitutes contributory negligence.* In an action to recover for personal injuries sustained by a miner since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the statute, the fact that plaintiff disregarded an established custom of the mine amounts merely to contributory negligence, which in such case is not available as a defense.

11. INSTRUCTIONS, § 105*—*when instruction as to form of verdict not erroneous.* An instruction as to the form of verdict is not objectionable because the words "here state the amount, if any, you find" were underscored, it being presumed that ordinary

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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men would understand that the blank space in the form submitted was to be filled in by the jury in case they found for plaintiff.

12. MINES AND MINERALS, § 196*—*when instruction as to right of employees to use track erroneous.* In an action to recover for personal injuries sustained by a miner since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the statute, and where plaintiff's injuries were sustained in a collision between a car which plaintiff was driving and a car driven by other employees, an instruction as to the relative rights of plaintiff and such other employees to the use of such track examined and held properly refused, there being no evidence to support the first part of the instruction, and the instruction claiming for such other employee's rights to use such track which were doubtful as a matter of law, as well as ignoring the duty of such other employees in using such track to exercise due care and caution not to expose plaintiff to unnecessary danger.

13. MINES AND MINERALS—*what are comparative rights of miners using tracks.* A miner, whose chief and main duty is to haul empties to and loaded cars from the rooms of miners, has a right to the use of the track superior to those using the track occasionally or incidentally, as for example, the hauling of miner's tools.

14. MINES AND MINERALS, § 126*—*when miners using tracks required to use care not to injure others.* Miners using the tracks of the mine for incidental and occasional purposes are bound to exercise due care and caution in such use, so as not to expose to unreasonable danger other miners having a right to use the track.

15. DAMAGES, § 110*—*when verdict not excessive.* In an action to recover for personal injuries sustained by a miner since the enactment of the Workmen's Compensation Act, where the employer elected not to provide and pay compensation as provided by the statute, and where plaintiff's injuries were sustained in a collision between cars in defendant's mine, a verdict for plaintiff for \$4,500 held not so excessive as to indicate passion or prejudice on the part of the jury.

Appeal from the Circuit Court of Madison county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915.

WARNOCK, WILLIAMSON & BURROUGHS and GILLESPIE & FITZGERALD, for appellant.

D. H. MUDGE, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE McBRIDE delivered the opinion of the court.

Appellee sued appellant to recover damages on account of personal injuries sustained by him while employed in its coal mine, and recovered a judgment for \$4,500, to reverse which this appeal is prosecuted.

Appellee, at the time of the injury, was employed as a driver in appellant's mine. The declaration consisted of five counts and charged a failure on the part of appellant to furnish appellee with a reasonably safe place in which to work. That appellant failed to keep the track used by appellee reasonably free of dangerous obstructions; that it permitted said track to be obstructed by a pit car standing upon said track with which appellee collided. That appellant failed to warn appellee of the obstruction standing upon said track and with which he collided. The declaration charges that appellant had elected not to accept the provisions of the Workmen's Compensation Act of Illinois, in force July 1, 1913. Appellant pleaded the general issue.

The evidence tends to show that appellee was injured on the 30th day of September, 1913; that at the time of the injury he was employed as a driver, working from a parting in what is known as the "Second Left North Parallel Entry" of appellant's mine, north to the ninth and tenth north entries, and thence to the west through the entries last named, to the face of said entries. His duties consisted in getting empty cars at the parting, located at the point of intersection of the parallel with the main entry, and hauling them to the rooms of the loaders, working in the ninth and tenth north entries, and hauling loaded cars from the rooms to the parting. This parting was about three hundred feet south of the point where the ninth and tenth north entries intersect the parallel. The ninth and tenth north entries are fifty feet apart and extend about three hundred feet west of the parallel.

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A trap door was located in this parallel entry, same being about fifteen feet north of the point of intersection of the ninth north entry with the parallel, and thirty-five feet south of the point of intersection of the tenth north entry with the parallel. A trapper was stationed at this door to open and close the same.

In the tenth north entry, being one of the entries in which appellee worked, beginning at room 19, there was a down grade, towards the parallel, and the evidence tends to show that when the car or cars of a trip passed on to this grade it was impossible to stop them until the trap door was reached. At the time of the accident appellee was hauling a trip from room 21 on the tenth north, and when he came from the room on to the entry track he was about two hundred feet from the trap door.

The evidence further tends to show that on the day of the accident two other servants of appellant, Vandy and Raysheck, who had been mining in the ninth north entry, were moving to a new working place in the tenth north entry. They had loaded their tools into an empty car and requested appellee to haul it to their new working place, and he promised to do so after making another trip, but it seems that they were not disposed to wait, and started to move the car themselves. They proceeded with their car out of the ninth north into the parallel, and turned north on their way to the tenth north. At the trap door, the trapper directed them to wait, informing them that appellee was in the tenth north and would be out immediately. The evidence tends to show that these men disregarded the notice given them by the trapper, and passed on with their car through the trap door, and when a few feet to the north of said door, appellee, who was coming with the trip from room 21 on the tenth north, collided with their car in the parallel, and sustained the injuries complained of.

As grounds for a reversal it is urged that the evi-

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dence fails to disclose any negligence for which appellant can be held liable, error in giving and refusing instructions, improper argument by counsel for appellee; and that the damages awarded are excessive.

Appellant having elected not to accept the provisions of the Workmen's Compensation Act, it has forfeited its right to interpose in this case the common-law defenses of assumed risk, fellow-servant, and contributory negligence, except that the latter may be shown for the purpose of reducing the damages. (*Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 5 N. C. C. A. 410.)

Appellant owed to appellee the duty of furnishing him a reasonably safe place in which to work. It was required to exercise reasonable care and diligence to keep the track in the entries in which he worked free from dangerous obstructions or other dangerous conditions which would expose him to danger, and for any breach of this duty it is liable in damages. It remains to be determined, therefore, whether Vandy and Raysheck were guilty of negligence in moving their car of tools in the maner they did, and if so was appellant chargeable with this negligence.

It is conceded that Vandy and Raysheck were servants of appellant, and it has been urged herein that they were acting within their rights in undertaking to move the car with their tools, at the time, and under the circumstances, then existing, and hence the rule of *respondeat superior* applies. If they were guilty of negligence at the time, their negligence was the negligence of appellant, and if in consequence of that negligence appellee was injured, it follows that appellant is liable to respond in damages for the injuries sustained. (Thompson on Negligence, vol. 1, secs. 518, 519, 520 and 521; *Barker v. Chicago, P. & St. L. Ry. Co.*, 243 Ill. 482; *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613; *Noble v. Cunningham*, 74 Ill. 51.)

Whether or not Vandy and Raysheck were guilty of

negligence, in attempting to move their car with their tools from the ninth to the tenth north, under the circumstances then existing, was a question of fact for the jury, and we cannot say that in finding that it was, the jury disregarded, or found contrary to, the weight of the evidence. These men knew that appellee was driving in these entries, and the parallel, and that his duties required him to use the tracks therein constantly. They had requested him to haul the car for them, and he had promised to do so after his next trip, and he had no reason to suppose that they would not wait for him for that purpose. The evidence tends to show that when they came to the trap door the trapper requested them to wait, and informed them that appellee was in the tenth north entry and would be out immediately. Notwithstanding this request and this notice, they proceeded on their way, and the collision resulted a few feet beyond the trap door in the parallel. This evidence tended to establish negligence on the part of these men. Their use of the track, under the circumstances and for the purposes disclosed, was an unusual one, which appellee was not bound to anticipate and guard against.

It has been urged by appellant that appellee disregarded a custom in force in this mine which required the driver, when coming down a grade, to stop at the top of the grade and signal his approach, and remain there until he received a signal from the trapper that the way was clear.

It may be remarked here that we find no satisfactory evidence of any such custom, nor did the officers and agents of appellant testify to any certain set of signals, which were in use, or which were followed, or which appellant sought to enforce in the operation of its mine. Nor do we perceive how appellee, if waiting at the top of the grade in the tenth north, some fifty or a hundred feet west of the parallel, could see a "high-ball," given by a trapper from his station in the

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parallel thirty-five feet south of the tenth north. But even if such custom had been clearly established and its violation clearly shown, this would have amounted to contributory negligence only, and as indicated by the authorities cited, that defense is not now available in actions of this character.

We have examined the given instructions for appellee of which complaint is made, and find nothing objectionable therein. We do not regard the underscoring of the words, "here state the amount, if any, you find," in the instruction as to form of verdict, objectionable. It is apparent that what is claimed to be an "underscoring" of the words, indicated nothing more than the blank space in the verdict to be filled in by the jury in case they found for appellee, and it is not to be presumed that ordinary men would understand it in any other light. The authorities cited by appellant do not sustain its criticism of this instruction.

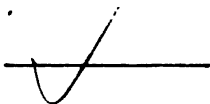
We do not think the court erred in refusing appellant's instruction of which complaint is made. There is no evidence in this record on which to base the first portion of the instruction, and we are not prepared to say that the rights therein claimed to exist do exist as a matter of law. It would seem, in fact, that a driver whose chief and main duty is to haul empties to and loaded cars from the rooms of the miners would have a superior right to the track as against an incidental and occasional use such as Vandy and Raysheck were making of the track at the time. There is no evidence tending to show that appellee knew of such use, and even if it be conceded that the rights of Vandy and Raysheck to use the tracks were equal to the rights of appellee, they were still bound to exercise those rights with due care and caution, and so as not to expose other servants of appellant having a like right, to unnecessary or unreasonable danger, and this instruction entirely ignores this principle of law.

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We cannot say that the argument of appellee's counsel, of which complaint is made, is of such a character as to require a reversal of the judgment herein, nor do we regard the size of the verdict, in view of the injuries sustained, as indicating passion or prejudice on the part of the jury.

Finding no reversible error in the record herein, the judgment of the Circuit Court is hereby affirmed.

Affirmed.



Marie Hughes, Administratrix, Appellee, v. Eldorado Coal & Mining Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Saline county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Marie Hughes, administratrix of the estate of James Hughes, plaintiff, against the Eldorado Coal & Mining Company, in the Circuit Court of Saline county, to recover for injuries resulting in the death of plaintiff's intestate, which injuries were sustained as a result of an explosion in defendant's mine where deceased was employed as a shot firer. From a judgment for plaintiff for \$2,500, defendant appeals. Deceased left a widow who prosecuted this action as administratrix for the benefit of the next of kin.

The first count charged that the third and fourth entries were dry and dusty and that the defendant wilfully failed and neglected to have the entries and

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roadways thoroughly sprinkled or cleaned, by reason of which and while Hughes was following his duty, and while the air in the entry and crosscut was so charged with dust, and by reason of the firing of the shots the dust became ignited, causing a violent explosion in the entries and crosscut, injuring the deceased Hughes.

The second count charged that defendant wilfully failed and neglected to conduct into the working place of Hughes an amount of air sufficient to render the working place reasonably free from deleterious air, etc., and that the air being charged with gas and dust became ignited causing a violent explosion, injuring deceased.

The fifth count charged that it was the duty of the defendant to use reasonable care to furnish a reasonably safe place in which to work and that the entries and crosscuts were in a dangerous condition, in that there had been a squeeze in the mine and the air passages partially closed to such an extent that sufficient quantities of fresh air could not be forced through the passages to prevent the air in the third and fourth entries and crosscuts from becoming deleterious. Also that the blast from the shots caused the gas, dust and other inflammable substances with which the air in the entries and crosscuts was charged and of which defendant had knowledge, to become ignited causing a violent explosion, injuring Hughes.

The original declaration then concluded with profert of letters of administration, etc.

The sixth or additional count was filed within one year of the time of the injury, and charged a storage of one hundred pounds of powder in the fourth west entry, and that the fire from the shots caused the powder to become ignited and to explode, injuring the deceased Hughes. This count then averred death, survivorship, and concluded with damages to the amount of \$3,000, and made profert of letters of administra-

tion, and then followed this averment: Plaintiff further avers that the said defendant had elected not to be bound by an Act of the General Assembly of the State of Illinois, commonly known as the Compensation Act, and that the plaintiff's intestate was bound by the terms of said act.

It appeared that James Hughes and his buddy, John Dunn, were employed by defendant as shot firers in its mine, and while so engaged on November 25, 1913, an explosion occurred by which the said James Hughes and John Dunn received fatal injuries. The explosion occurred in the third and fourth west entries off of the second north entry in the mine. The entries are the first and second north extending north and south, and the first, second, third and fourth west entries, which are turned to the west off of the second north. The north entries extended some distance north of the third and fourth west entries. Air was circulated by a fan, producing a downcast of air, passing into the first north entry and after going some distance beyond the fourth west it was returned through the second north to the fourth west entry, and thence west through the fourth west entry and at the end of this returned by the third west to the second north and thence south to the second west entry, thence west, returning by the first west to the second north entry, and thence passing into the shaft. There was evidence tending to show that a squeeze in the first and second west entries causing the top to fall and to some extent to stop up these entries so that the passage for the air in returning to the shaft was very much smaller in these entries than in the third and fourth entries. Room No. 9 was located about two-thirds of the distance west on the fourth west entry and north of the second north entry. Ten shots had been placed in these entries to be fired by Hughes and Dunn. Room No. 9 had two shots placed in it. There was one shot in the face of the fourth west entry, one in the cross-

cut being opened near the face of that entry, two in the face of the third west entry and two in each of the two stub entries off the third west and opposite the crosscut marked 12 on the plat. On the afternoon of the 25th of November, Hughes and Dunn went into these entries and fired the shots located and while being fired an explosion occurred injuring both these shot firers. It was disputed where the shot firers commenced firing. It was claimed by plaintiff that the evidence showed they commenced firing in the third west entry, and by defendant that they commenced in the fourth west entry and fired with the air current, and defendant contended that the evidence showed that the cause of Hughes' death was firing his shots in too rapid succession and with the air, carrying the powder smoke or carbon monoxid from one shot to the other, resulting in an explosion, and claimed to be sustained by the fact that a portion of the skin of a burned hand, a portion of a little finger, cap, lamp and other things were found in the third west entry. It was contended by plaintiff that the roadway in these entries was very dusty, and that the circulation of air being very poor, the dust mingled with the powder smoke and firing the shots in succession, the standing powder smoke combined with the dust ignited and produced the fatal effect; and also claimed that there was evidence of charred dust upon the roof and props of the entry and that the dust had been burned and coked and stuck to the timbers and roof of the entry, and that the dust in the air was one of the causes of the explosion.

Hughes and Dunn were found in the fourth west entry and at the distance of about forty feet from the second north entry.

Defendant pleaded the statute of limitations to the first, second and fifth counts, and plaintiff's demurrer to the plea was sustained. The cause was tried by jury. At the conclusion of plaintiff's evidence, the court excluded the evidence and directed a verdict as

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to the third, fourth and sixth counts, but refused the motion as to the first, second and fifth counts. The motion was renewed at the close of all the evidence and again refused. After verdict plaintiff was permitted to amend by inserting in each count the allegation that defendant had elected not to be bound by the act commonly known as the Compensation Act. The jury found for plaintiff.

WILLIAM E. WHEELER and WHITLEY & COMBE, for appellant.

SOMERS & MILEY and HARTWELL & WHITE, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT, § 12*—*when not necessary to allege in all counts that employer had elected not to come under Compensation Act.* In an action at common law to recover for personal injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, a general averment in one of several counts that the employer had elected not to provide and pay compensation as provided by the statute is sufficient although other counts contain no such averment, such averment being of a general character not peculiar to any count but pertaining to all counts.

2. DEATH, § 36*—*when not necessary to allege in all counts that deceased left next of kin.* Although it is usual in practice in actions to recover for death to aver in all counts of the declaration that deceased left next of kin, it is not necessary to do so, and the statutory requirement is met if such allegation appear in one count.

3. LIMITATION OF ACTIONS, § 69*—*when use of additional counts alleging survivorship does not constitute new cause of action.* In an action to recover for death, where the declaration contains but one count which alleges that deceased left next of kin, additional counts or an amended declaration averring survivorship in each count is

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not the statement of a new cause of action, but a restatement in amplified form of the original cause of action.

4. PLEADING, § 56*—*when count preserved as part of declaration after direction of verdict.* Where the evidence as to a count is stricken and a verdict directed as to the count, the count is not thereby stricken but remains part of the declaration for reference purposes and may furnish a sufficient basis for additional counts setting forth the cause of action in a manner more accurate and legal than in the disapproved count.

5. WORKMEN'S COMPENSATION ACT, § 12*—*when declaration in action for death sufficient.* In an action at common law to recover for injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the statute, declaration examined and held as a whole to state a complete cause of action.

6. WORKMEN'S COMPENSATION ACT, § 12*—*when declaration sustained by one good count.* In an action at common law to recover for injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, where defendant pleaded the statute of limitations to three counts not alleging that the employer had elected not to provide and pay compensation as provided by the statute, a demurrer to the plea held not erroneously sustained where a count to which the statute was not pleaded sufficiently alleged such election.

7. WORKMEN'S COMPENSATION ACT—*what is liability of employer under act.* An employer operating under the Workmen's Compensation Act is liable for all injuries sustained by his employees acting within the scope of their employment, regardless of questions of negligence, proximate cause or accident.

8. WORKMEN'S COMPENSATION ACT, § 2*—*when presumed that employer decided not to come under Workmen's Compensation Act.* In an action at common law to recover for personal injuries sustained by an employee since the enactment of the Workmen's Compensation Act of 1913, it will be assumed as a fact that defendant had elected not to pay compensation in accordance with the act, where counsel conceded in argument that defendant was not operating under the act at the time of the injury and never had been so operating, although there was no evidence of such fact.

9. WORKMEN'S COMPENSATION ACT, § 2*—*when action of counsel constitutes declaration that employer not operating under statute.* In an action at common law to recover for injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, the action of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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counsel for defendant in offering evidence tending to show that negligence of defendant was not the proximate cause of the injury sought to be recovered for is equivalent to a declaration that defendant was not operating under the statute.

10. TRIAL, § 34*—*when courts reluctant to sustain objections.* Courts are reluctant to sustain objections where a party has lost no rights by reason of the matters objected to and where nothing is to be gained by sustaining the objections.

11. EVIDENCE, § 206*—*what constitutes a declaration against interest of deceased person.* In an action to recover for personal injuries resulting in the death of plaintiff's intestate, a miner, since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the act, and where plaintiff's injuries were the result of an explosion occurring immediately after deceased fired certain shots, and where defendant's theory of the accident was that the shots were fired with the air, causing the powder smoke or carbon monoxid to be carried from one shot to another, causing the explosion, a statement of deceased's buddy tending to confirm defendant's theory is a statement against the interest of the declarant, it appearing that declarant was injured by the same explosion.

12. EVIDENCE, § 205*—*when declarations of deceased person admissible.* Declarations made by a deceased person against his interest are competent.

13. EVIDENCE, § 143*—*what constitutes secondary evidence.* Declarations made by a deceased person against his interest, when competent, are secondary evidence.

14. EVIDENCE, § 206*—*what constitute declarations by deceased person against interest.* Declarations by a deceased person against his interest constitute a class of evidence embracing not only entries in books but all other declarations or statements of fact, verbal or written, whether made at the time of the fact declared or at a subsequent date.

15. EVIDENCE, § 205*—*when declarations of deceased person competent.* In order to render the declarations of a deceased person competent it must appear that the declarant is dead, and that while alive he possessed competent knowledge of the facts or that it was his duty to have such knowledge, and that the declarations sought to be proved were at variance with his interest.

16. EVIDENCE, § 464*—*how weight and value of declarations against interest of deceased person determined.* The weight and value as evidence of declarations of a deceased person against his interest is to be determined by other evidence in the case.

17. EVIDENCE, § 204*—*when declarations against interest of deceased person competent.* Declarations by a deceased person against

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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his interest are competent to prove collateral or independent facts embodied in such declarations.

18. EVIDENCE, § 204*—*when declarations against interest of deceased person competent.* Declarations by a deceased person against his interest are competent in a suit between strangers.

19. EVIDENCE, § 177*—*competency of declarations by third party.* Declarations by a third party are not generally competent.

20. EVIDENCE, § 204*—*when declarations of deceased person competent.* In an action at common law to recover for injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the statute, and where defendant's theory of the explosion causing the injuries was that deceased fired shots in the air, causing the powder smoke or carbon monoxid to be carried from one shot to another, resulting in the explosion, the exclusion of a declaration by deceased's buddy, also injured by the explosion, tending to confirm defendant's theory *held* erroneous, it appearing that the declarant was dead, and that the statement was against interest.

21. INSTRUCTIONS, § 28*—*when giving of erroneous oral instruction not cured.* An erroneous oral instruction involving the statement of the opinion of the trial judge as to the sufficiency of the evidence to prove a contested fact is not cured by directing the jury to disregard such instruction.

22. INSTRUCTIONS, § 28*—*when no right to instruct orally.* An oral instruction to a jury is in violation of section 73 of the Practice Act (J. & A. ¶ 8610), providing that no judge shall instruct the jury in a civil or criminal case unless such instructions are reduced to writing.

23. APPEAL AND ERROR, § 590*—*when exception to instruction timely as basis for error.* An assignment of error in instructions is warranted where the exception to the instruction objected to as erroneous was taken immediately after the instruction was given.

24. INSTRUCTIONS, § 71*—*when instruction assuming disputed facts erroneous.* In an action at common law to recover for personal injuries resulting in the death of plaintiff's intestate, a miner, sustained since the enactment of the Workmen's Compensation Act of 1913, where the employer elected not to provide and pay compensation as provided by the statute, such injuries being caused by an explosion in defendant's mine where deceased was employed as a shot firer, an instruction assuming that a dangerous condition existed in the mine at the time of the accident *held* erroneous where the facts assumed were contested, and where an erroneous oral instruction had previously been given on the same count.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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25. MINES AND MINERALS, § 191*—*when instruction as to duty of operator to sprinkle and clean roadways erroneous as being too broad.* In an action to recover for injuries sustained resulting in the death of plaintiff's intestate, a miner, since the enactment of the Workmen's Compensation Act of 1913, where the employer had elected not to provide and pay compensation as provided by the statute, where two counts in the declaration alleged "that the defendant wilfully failed and neglected to have the entries and roadways thoroughly sprinkled or cleaned," an instruction to find defendant guilty if the jury found that defendant committed the wilful violation charged in such counts, *held* erroneous as being broader than clause m of section 14 of the Miners' Act (J. & A. ¶ 7488), providing that "the operator of such mine must have such roadways regularly and thoroughly sprayed, sprinkled or cleaned."

26. MINES AND MINERALS, § 41*—*what constitutes wilfulness within Mining Act.* To constitute wilfulness within the meaning of the Miners' Act (J. & A. ¶ 7475 *et seq.*), the act charged to be wilful must be an act prohibited by the statute.

27. APPEAL AND ERROR, § 1391*—*when evidence not discussed.* Where a judgment is reversed for errors of law, the Appellate Court is not warranted in expressing views on the evidence.

Thomas J. Osborn, Appellee, v. City of Mt. Vernon,
Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Jefferson county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Thomas J. Osborn, plaintiff, against the City of Mt. Vernon, defendant, in the Circuit Court of Jefferson county, to recover for injury to a horse. From a judgment for plaintiff for one hundred dollars,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

defendant appeals. The action was commenced before a justice of the peace and appealed to the Circuit Court.

It appeared that plaintiff owned a horse which he hired to John Griggs to be used in delivering goods, which on May 20, 1914, was driven by Alva Thomas, a boy of the age of seventeen years. He had driven up Cherry street and had just passed on to 12th street and while driving in the center of the street the horse slid to the side of the street and fell into a catch-basin and was badly injured. The boy testified that at the time he passed on to 12th street he was driving at the rate of about seven or eight miles an hour.

It was stipulated that the street occupied and controlled by the city was of the width of sixty feet, and had been paved to a width of twenty-four feet.

The tracks made by the horse in sliding extended from about the center of the street east to the catch-basin. The catch-basin was at the outside of and adjacent to the paved portion of the street and was described by the mayor as being of the depth of twenty-four inches at the side next to the pavement, extending back to curb line thirty inches, and that north and south it was twenty-seven inches. The mayor knew of this catch-basin and at times it was covered over with a rock which lay at one side but had been removed so as to permit the water from the street to drain into the catch-basin. An ordinance was introduced in evidence providing that no horse should be driven faster than six miles per hour upon any street or alley in the city, nor faster than four miles per hour in turning a corner.

FRANK G. THOMPSON, for appellant.

JOEL F. WATSON and CONRAD SCHUL, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 195*—*when verdict should not be directed*. In an action against a city to recover for injury to a horse as a result of the defective condition of a catch-basin in a public street, the refusal of a motion by defendant for a peremptory instruction in its favor *held* not erroneous, there being evidence which with reasonable intendments tended to show negligence of defendant, and there being no evidence from which it could be said as a matter of law that the driver of the horse was not in the exercise of due care and caution.

2. APPEAL AND ERROR, § 1391*—*when evidence will not be discussed*. Where a judgment is reversed for errors of law, the Appellate Court will not commend on the weight of the evidence.

3. MUNICIPAL CORPORATIONS, § 970*—*what is duty as to care of streets*. A municipal corporation is bound to use reasonable care to keep its streets in a reasonably safe condition, and the duty includes keeping such streets reasonably free from obstructions throughout their entire width.

4. MUNICIPAL CORPORATIONS, § 1048*—*what care persons using street must exercise*. Persons traveling on a public street are bound to exercise due care and caution for their own safety while so traveling.

5. MUNICIPAL CORPORATIONS, § 1057*—*what constitutes want of due care in driving on street*. It is not necessarily a want of due care and caution to drive a horse on a public street at a speed prohibited by a city ordinance, as, for example, where without the fault of the driver the horse runs away and cannot be restrained by the exercise of due care on the part of the driver.

6. MUNICIPAL CORPORATIONS, § 1107*—*when contributory negligence of driver of team question for jury*. In an action against a city to recover for injury to a horse as a result of a defective catch-basin in a public street, where it appears that at the time of the accident the horse was being driven along such street at a speed in violation of a city ordinance, the question of the contributory negligence of the driver is to be determined by the jury under all the evidence.

7. MUNICIPAL CORPORATIONS, § 1100*—*when instruction on care of streets erroneous*. An instruction that a city is bound to keep its streets in a reasonably safe condition is bad as requiring a greater degree of care than required by law.

8. INSTRUCTIONS, § 81*—*when instruction emphasizing particular facts erroneous*. An instruction pointing out particular facts as constituting negligence, if omitted, is bad.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Osborn v. City of Mt. Vernon, 197 Ill. App. 267.

9. NEGLIGENCE, § 191*—*when question for jury.* It is for the jury to determine what facts constitute negligence in a particular case.

10. NEGLIGENCE, § 115*—*doctrine of comparative negligence not prevailing.* The doctrine of comparative negligence is not law in this State.

11. MUNICIPAL CORPORATIONS, § 1104*—*when instruction erroneous as directing facts constituting negligence and as assuming facts.* In an action against a city to recover for injury to a horse as a result of the defective condition of a catch-basin in a public street, an instruction that plaintiff could recover if the jury "believe from the evidence that the defendant was guilty of gross negligence in allowing the hole in the public street to remain open and unprotected, if proven, and in a dangerous condition, so that persons or animals passing along, across and over said street might fall in and be injured," held erroneous as directing the acts constituting negligence, and as assuming facts to be proved.

12. APPEAL AND ERROR, § 1565*—*when modification of requested instruction prejudicial error.* It is prejudicial error to modify a requested instruction ending "then you should find for defendant" by substituting the word "may" for the word "should," since the instruction as modified leaves a discretion to the jury to find for plaintiff, although they find the facts to be as stated in the instruction.

13. INSTRUCTIONS, § 154*—*when requested instructions should not be modified.* Requested instructions making it mandatory for the jury to find for such party under named conditions should not be modified by substituting words, leaving the jury discretion to find for the other party, even though the named conditions are found to exist.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Silas Williams, Administrator, Appellee, v. Mt. Vernon Car Manufacturing Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Jefferson county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Silas Williams, administrator of the estate of Willie Williams, plaintiff, against the Mt. Vernon Car Manufacturing Company, defendant, for causing the death of the plaintiff's intestate. From a judgment for plaintiff, defendant appeals.

As alleged, the death was caused by the negligence of the defendant in shifting cars upon the tracks in its manufacturing plant without giving proper warnings, whereby the deceased, an employee, was crushed between the cars.

G. GALE GILBERT, for appellant.

HART & WILLIAMS, CONRAD SCHUL and MOSES PULVERMAN, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 221*—*when instruction not confining jury to negligence alleged erroneous.* In an action to recover for personal injuries caused by the negligence of the defendant, an instruction which fails to confine the jury to the particular negligence alleged in the declaration as the cause of the injury sustained, but allows

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Reese v. Bartlett, 197 Ill. App. 272.

them to base their finding upon any character of negligence shown by the evidence, is erroneous.

2. NEGLIGENCE, § 216*—*when instruction on negligence as modified invades province of jury.* In a personal injury action based on the defendant's negligence, it is erroneous for the court to substitute the word "may" for "should" in the defendant's instruction, reciting the negligence charged in the declaration, seeking to confine the negligence to that alleged and charging the jury that unless the negligence was of the character so described and alleged in the declaration they should find the defendant not guilty, inasmuch as by such modification the discretion of the jury was substituted for their duty.

3. DEATH, § 73*—*when instruction erroneous as not limiting damages to pecuniary damages resulting from death.* An instruction in an action for causing the death of the plaintiff's intestate, that the plaintiff is entitled to recover "for the exclusive benefit of the widow and next of kin of the deceased, such damages as the jury may believe from the evidence the said widow and next of kin have sustained by reason of said death, not to exceed in all, however, the sum of ten thousand dollars," is erroneous in not limiting the damages to the pecuniary damages resulting from the death.

L. D. Reese, Appellant, v. O. L. Bartlett, Appellee.

1. WORKMEN'S COMPENSATION ACT, § 2*—*when Workmen's Compensation Act becomes part of contract of employment.* When an employer elects to operate its plant and an employee to perform work for the employer under the Workmen's Compensation Act, such act becomes a part of the contract of employment.

2. WORKMEN'S COMPENSATION ACT, § 12*—*when declaration in action of assumpsit by servant against master sufficient.* A declaration in an action of assumpsit by an employee against his employer to recover compensation for injuries sustained in the course of the employment, alleging that the parties were working and operating under the Workmen's Compensation Act, and, among other proper allegations, that, though requested to do so by the plaintiff, the defendant refused to appoint an arbitrator in accordance with the provisions of the act, is not subject to demurrer.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Reese v. Bartlett, 197 Ill. App. 272.

3. WORKMEN'S COMPENSATION ACT, § 5*—*when assumpsit and not mandamus lies in action by servant against master.* Where an employer and employee are operating and working under the Workmen's Compensation Act and the employee, having sustained injuries in the course of his employment, requests his employer to name an arbitrator in accordance with the provisions of the act, which request is not complied with, the employee may sue in assumpsit, for breach of contract and will not be compelled to resort to an action of mandamus, as that remedy would not give the plaintiff such speedy relief as he is entitled to.

Appeal from the Circuit Court of Pulaski county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed December 1, 1915.

CHARLES L. RICE and FRED HOOD, for appellant.

WALL & MARTIN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The defendant in the court below filed a demurrer to plaintiff's declaration, which was sustained by the court, and the plaintiff having elected to stand by his declaration judgment was thereupon rendered against him for costs, and he now seeks a reversal of this judgment.

The declaration contained two counts, the first of which alleges that the plaintiff was employed by the defendant in the manufacturing plant owned and operated by the defendant, and that on the 24th of February, 1913, while engaged at work for the defendant in removing the back from a dust conveyor near a circular saw which was operated by steam power, he was injured. That such injury consisted of the severing of three fingers and the thumb from his left hand and that such injury arose out of and in the course of plaintiff's employment with the defendant as fireman and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

factotum in and about and for the said plant. That his average annual earnings were \$624, and that by reason of such injury he became totally disabled for a period of three months. That since his recovery he had only been able to secure casual employment at a much less wage than he was accustomed to receive and was unable to secure regular employment. The declaration further alleges that at the time of the said injury the plaintiff and the defendant were working and operating under the provisions of the Compensation Act of 1911. That on March 1, 1913, plaintiff demanded and requested of the defendant the amount of compensation to which plaintiff was then entitled by virtue of said statute, on account of the injury so received, and that the defendant then and there refused to pay the plaintiff any sum of money as compensation under said act or otherwise. And denied that plaintiff was entitled to compensation under the act because the accident or injury to the plaintiff did not arise out of or in the course of his employment with the defendant, and that a dispute then and there arose between the plaintiff and the defendant of both matters of law and fact. That the defendant refused to agree with plaintiff with reference thereto. It is further alleged that after the plaintiff and defendant had failed to reach an agreement upon the said disputed questions of law and fact, the plaintiff on April 1, 1913, selected a disinterested party to act as arbitrator and then and there requested the defendant to select a disinterested party to act as such arbitrator, in accordance with said statute, which the defendant then and there refused and still does refuse to appoint such arbitrator. That the defendant also refused to pay the said sum of money there mentioned or any part thereof to the plaintiff. The second count of the declaration is substantially the same as the first. To this was also added the common counts which concluded in the usual form in alleging the damages sustained by the plaintiff in

the amount of one thousand dollars. The demurrer to this declaration was sustained. The question presented by this demurrer and argued by counsel for appellant and appellee is, Can the appellant sue in assumpsit and recover compensation for an injury received after he had selected an arbitrator, as provided by the statute, and the appellee had refused to select an arbitrator upon request so to do by the appellant, and while the plaintiff and the defendant were operating under the Compensation Act of 1911? It is very clear from the language of this statute that when a dispute arose between the appellant and appellee as to the facts and law involved in the case that it became their duty to submit the matters so in dispute to arbitrators, in the manner required by statute.

It further appears from the allegations of this declaration that there were questions of law and fact in dispute between these parties. That the appellant selected an arbitrator and demanded that appellee also select one for the purpose of settling such dispute. This the appellee refused to do and by such refusal no arbitration could be had of the differences between them, as the statute provided no means of selecting such arbitrator when either of the parties refused to so select.

The declaration alleges, and it is admitted by this demurrer, that the injury was sustained while plaintiff was engaged at work for the defendant, and that such injury did arise out of and in the course of the employment. When the defendant elected to operate its plant and the plaintiff to perform work for the defendant under the compensation act aforesaid, then such act became a part of the contract entered into between these parties for the performance of this work. It is said by the Supreme Court, in commenting upon this particular statute, that: "Having once elected to come within the provisions of the act, as long as such election remains in force the act is effective as to the

party or parties making the election, and in case an employer and employee both elect to come within the provisions of the act, the act itself then becomes a part of the contract of employment and can be enforced as between the parties as such." *Deibeikis v. Link-Belt Co.*, 261 Ill. 465 (5 N. C. C. A. 401). If it be true that the election to come under the provisions of this act made the act itself a part of the contract between the parties, then each party was bound to perform whatever was required by such contract, and a failure upon the part of either to do the things required of such party, by such statute, would constitute a breach of such contract. In this case the appellee refused to select an arbitrator when demanded so to do, and under such circumstances, as appears from the averments of this declaration, he was bound to make such selection, and having failed and refused to make the selection, it appears to us that such failure constituted a breach of the contract existing between these parties. Such failure and refusal upon the part of the appellee did exist, and we can see no reason why appellant should not have a right of action against the appellee in assumpsit for the breach of this contract. If such conditions existed as to warrant the appellee in refusing to select an arbitrator, then there could be no breach of the contract in that respect, but this is a matter that should be determined by the court upon a hearing. It is said by counsel for appellant that: "We have an action based upon the act itself, reciting its very terms and alleging that employer and employee were operating under its provisions, and for a jury to render a verdict under it, they must make the computations according to its provisions, etc." He also says: "Both the plaintiff and defendant contracted and agreed with each other that the defendant was relieved from any liability to pay damages, except as provided in the act, according to section 1 thereof," and that no common law or statutory right to recover damages for

the injury other than the compensation in such statute provided was available to an employee operating under this act. It may be that if it appears upon a trial that there has been a breach of this contract and that as the parties have made a specified contract with reference to the compensation, that in assessing damages this contract should be taken into consideration in determining the amount of damages, but that question is not before us and is not necessary to be determined, for if the appellant had a contract with the appellee and there was a breach of the contract, then he was entitled to sue for this breach, and the question of the amount of damages could be determined upon the trial. It is said by counsel for appellee that if the appellee refused to select an arbitrator that then the appellant's remedy would be to resort to a mandamus. Waiving the question of the right to an action of mandamus in such cases this, in our judgment, would not be giving appellant such speedy relief as he is entitled to receive, if there was in fact a breach of his contract. The contract and the breach are set out in this declaration and we cannot see why such declaration should not be sustained. We are of the opinion that the declaration sets out a good cause of action in assumpsit and that the lower court erred in sustaining the demurrer thereto, and the judgment of the lower court is reversed and the cause remanded with directions to overrule the demurrer.

Reversed and remanded with directions.

Charles Rushing, Appellant, v. O. L. Bartlett, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Pulaski county; the Hon. WILLIAM N. BUTLER, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed December 1, 1915.

Statement of the Case.

Action by Charles Rushing, plaintiff, against O. L. Bartlett, defendant. From a judgment sustaining the defendant's demurrer to the declaration, the plaintiff appeals.

The declaration and demurrer being substantially the same as those in the case of *Reese v. Bartlett*, ante, p. 272, and the questions made and argued the same, the opinion filed therein was adopted herein.

CHARLES L. RICE and FRED HOOD, for appellant.

WALL & MARTIN, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Schmidt v. Marine Milk Condensing Co., 197 Ill. App. 279.

Jacob C. Schmidt, Appellee, v. Marine Milk Condensing Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed December 1, 1915.

Statement of the Case.

Action by Jacob C. Schmidt, plaintiff, against the Marine Milk Condensing Company, defendant, to recover the balance of the price of milk sold the defendant. From a judgment for plaintiff, defendant appeals.

The defendant was engaged in the business of purchasing milk and the plaintiff had been delivering milk to the defendant, the delivery for each month being settled and paid for on or about the 15th of the succeeding month. During the month of October, 1913, the plaintiff had delivered to the defendant 6,563 pounds of milk, and on or about the 11th or 12th of November the plaintiff visited the office of the defendant and there met the president. The purpose of his visit was to make prices for milk for six months from October 1st, and he then had a conversation with the president of the defendant company who told him that \$1.85 per hundred would be paid him for six months beginning October 1, 1913, the milk to be delivered at Marine. Shortly thereafter the defendant caused to be published in the Marine Telegram the following notice: "Notice is hereby given that the Marine Milk Condensing Company guarantees an average price of \$1.85 per hundred for milk for the six months beginning October 1st and ending April 1st. Henry Rieke, Manager." The plaintiff saw and read this notice

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about the time of its insertion and continued to deliver milk to the defendant until April 1st. At the end of each month a statement was sent from the main office of the defendant to their agent at Marine, together with a check for the amount of milk delivered during that month. It appears that for the month of October the check was \$1.75 per hundred, February \$1.80 per hundred, and March \$1.75 per hundred, and the other months was \$1.85 per hundred. Each time the check was below \$1.85 the plaintiff complained to the agent that it was not enough but accepted the check and cashed it, and upon the payment of the last check he told the agent of the defendant at Marine that unless they paid the balance to make up the \$1.85 he would sue them. The balance was not paid and this suit was brought to recover the same.

DAN MCGLYNN and WILLIAMSON, BURROUGHS & RYDER,
for appellant.

SPRINGER & BUCKLEY, for appellee.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 309*—*when seller receiving less than contract price for goods may maintain action for balance.* Where under a contract for the sale of goods, deliveries to extend over a stated period, the buyer agrees to pay therefor at stated intervals at a specified average rate per pound, and the seller accepts, under protest, checks in payment thereof at a rate less than that agreed upon, he may, at the expiration of such period, recover the difference between the total amount of such payments and the stipulated total price so agreed to be paid, as such payments will be considered as having been accepted as part payment only.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. SALES, § 15*—*when doctrine of mutuality inapplicable.* Where, in accordance with an offer to accept and pay for certain goods at a stipulated price, the delivery thereof is made and accepted, the offer becomes a binding promise to pay therefor, even though the seller was not bound to deliver, the doctrine of mutuality having no application in such case.

3. SALES—*what constitutes offer to purchase goods acceptable before revocation.* A notice inserted in a publication stating that the signer thereof guaranties to pay a stated price for certain goods, to be delivered during a designated period in the future, is not a mere invitation to trade but an offer, the acceptance of which, in accordance with its terms and before revocation, constitutes a sufficient compliance to ripen the offer into a binding promise to pay.

4. GAMING, § 16*—*when offer to receive and pay for goods for future delivery not option.* Where actual acceptance is intended, an offer to receive and pay for goods to be delivered in the future, though the offeree is not bound to make such delivery, is not the giving of an option in violation of section 130 of the Criminal Code (J. & A. ¶ 3733).

5. SALES, § 330*—*when instruction as to necessity of compliance with terms of offer correct.* An instruction that unless the plaintiff, in an action for the price of goods sold and delivered, complied with the terms of the offer of purchase he cannot recover is correct.

6. SALES, § 331*—*what is measure of damages for failure to pay balance due for goods sold by the pound.* In an action to recover the balance due under a contract to pay for goods sold at certain intervals at a stated average price per pound, the measure of damages is the product of the number of pounds delivered and the difference between the stipulated average price and average price paid.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Myrtle Richards, Appellee, v. Illinois Central Railroad Company, Appellant.

1. DAMAGES, § 186*—*when plaintiff as witness should not speculate on possible injuries received.* In an action to recover for personal injuries, a plaintiff-witness should not be permitted, over objection of the defendant, to speculate on possible injuries he may have sustained.

2. DAMAGES, § 165*—*what may be proved under specific allegations as to injuries.* Where the allegations of injury in the declaration for damages for personal injuries are general, any injury that could reasonably be included in the general allegations may be proved, but where the declaration undertakes to specify a particular injury or injuries, then only such injury or injuries as are specified, or such as reasonably follow from the injuries specified, can be put in proof.

3. NEGLIGENCE, § 165*—*when evidence inadmissible as not conforming to pleadings.* In an action for personal injuries alleged to be due to negligence, under an allegation of injury to the womb, testimony as to injury to the eyes should not be admitted, such injury not being reasonably referable to the injury alleged.

4. DAMAGES, § 186*—*when evidence inadmissible as to possible future effect of injury.* In an action for personal injuries, a physician should not, over objection, be permitted to speculate upon the probable or possible future effect of the alleged injuries upon the health of the plaintiff, but his testimony should be confined to consequences reasonably certain to result therefrom.

5. INSTRUCTIONS, § 88*—*when instruction on determination of preponderance of evidence erroneous.* An instruction is erroneous which, in undertaking to inform the jury as to the elements to be considered in determining the preponderance of the evidence, fails to include the element of the number of witnesses.

6. INSTRUCTIONS, § 129*—*when instruction directing verdict erroneous.* An instruction is erroneous which directs a verdict on the finding of facts as therein stated but fails to include an important controverted fact.

Appeal from the Circuit Court of Union county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 4, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richards v. Illinois Central Railroad Co., 197 Ill. App. 282.

CRAWFORD & CRAWFORD, W. W. BARR and C. E. FEIRICH, for appellant; BLEWETT LEE and W. S. HORTON, of counsel.

JAMES LINGLE, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

This was an action on the case brought by appellee against appellant on account of personal injuries alleged to have been sustained by appellee while a passenger on one of appellant's trains from Anna to Ullin, Illinois, on July 4, 1914. The declaration is in three counts. The first count charges that while appellee was a passenger, and while attempting to alight from the train at Ullin, the train was negligently, suddenly and violently started and moved, throwing appellee to the ground, resulting in appellee being greatly bruised, hurt and crippled; that the womb of appellee was thereby dislocated, bruised, and misplaced, and that appellee was permanently injured, etc.

The second count charges negligence of appellant in having the door of the coach in which appellee was riding locked and fastened so that appellee was prevented from making reasonable egress therefrom, and that servants of appellant negligently directed appellee to an egress where there was no servant of appellant to assist appellee in alighting, and no footstool for appellee to step on, it then and there being dark, and that as a result thereof appellee was injured. The injuries alleged are the same as in the first count.

The third count is substantially the same as the second count. Appellant filed a plea of the general issue and a trial by a jury resulted in a verdict and judgment for appellee for \$3,700 and costs.

The evidence for appellee tended to show that on July 4th there was a celebration at Anna which appellee attended, leaving Anna for Ullin, her home, about ten o'clock on that night; that there was a large crowd

there and several more passenger coaches on the train than customary; that appellee rode in a Pullman car; that the station of Ullin was called by appellant's porter, and when the train stopped appellee found difficulty in getting out of the car, saying that the south door was locked. She, however, went through the smoking compartment of the Pullman in which she was riding and through the next day coach to the south, and while standing on the steps to get off, the train started and threw her off. She had her baby and an umbrella in her arms at the time. Appellee was allowed to testify, over objections of appellant, to numerous ailments claimed to have resulted from the fall, and she also introduced certain expert evidence on the subject which appellant contends was improper. She claimed to have had an abortion and other troubles, although in this she was contradicted by some of the physicians' evidence on her behalf.

The evidence for appellant was to the effect that no such accident occurred, and also that several of the ailments she complained of had existed long prior to the time of the alleged injury.

Various grounds are urged by counsel for appellant as reasons for the reversal of the judgment. We shall consider but two: First, the alleged error in the admission of evidence offered on the part of appellee; and second, the error assigned on the giving of improper instructions offered on part of appellee.

On the trial of said cause appellee was permitted by the court, over repeated objection on the part of appellant, to speculate on the possible injury she may have sustained. During the direct examination of appellee, after she had described her alleged fall and following sickness, she was asked these questions:

"Have you noticed any difference in your eyesight?" Objected to by appellant on the ground that there was no claim for injury to the eyesight in the declaration. Objection overruled. "A. Why, my

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eyesight is hard at times. I can see sooty substances before me and that is all I can see.

“Q. I suppose when you are not affected that way you can read and see? A. I can see and read, but I can't see the distance I did before.”

In the three counts of appellee's declaration she makes specific claim for injury to her womb, but makes no claim for injury to her eyesight. Where the allegations of injury in a declaration are general, we understand that any injury that could reasonably be included in the general allegation may be proved, but where the declaration undertakes to specify a particular injury or injuries, that then only such injury or injuries as are specified, or such as reasonably follow from the injuries specified, can be put in proof.

There being no claim for injury to appellee's eyes, and the injury to the eyes not being reasonably referable to the injury charged to have been caused to appellee's womb, proof of injury to the eyes should not have been allowed. *North Chicago St. R. Co. v. Lehman*, 82 Ill. App. 238.

The physicians who testified on behalf of appellee were permitted by the court to answer, over objection of appellant, various questions which allowed said physicians to speculate upon the probable or possible future effect of the alleged injury upon appellee's health.

The jury in returning the verdict in this case undoubtedly took into consideration the question of a permanent injury to appellee, and just how much effect the evidence of appellee and her physicians may have had on the verdict, and the amount of damages assessed, it is impossible to determine.

In the case of *Lyons v. Chicago City Ry. Co.*, 258 Ill. 75, the court in passing on this character of testimony at page 81 says: “A surgeon may testify as to the nature of a wound and as to the effects or consequences which may be reasonably expected to happen,—not

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merely speculative or possible. (1 Wharton on Evidence, sec. 441; Jones on Evidence (2nd Ed.) sec. 378; 12 Am. & Eng. Encyc. of Law (2nd Ed.) 447, and cases cited.) If it form a proper basis for recovery it is necessary that the consequences relied on must be reasonably certain to result. They cannot be purely speculative. (*Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, and cases cited; *Murphy v. Boston and Albany Railroad Co.*, 167 Mass. 64.)” Again on page 82 the court says: “It may be that this improper evidence accounted for a large part of the verdict. Such an error in the admission of evidence is not susceptible of computation, and even a remittitur cannot cure it. *Lauth v. Chicago Union Traction Co.*, *supra*; *Chicago City Railway Co. v. Henry*, 218 Ill. 92; *Shaughnessy v. Holt*, 236 id. 485.”

Again in the case of *Amann v. Chicago Consol. Traction Co.*, 243 Ill. 263, at page 267, the court says: “A mere possibility, or even a reasonable probability, that future pain or suffering may be caused by an injury, or that some disability may result therefrom, is not sufficient to warrant an assessment of damages. It would be plainly unjust to require a defendant to pay damages for results that may or may not ensue and that are merely problematical. To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future. *Lake Shore and Michigan Southern Railway Co. v. Conway*, 169 Ill. 505; *Chicago and Milwaukee Electric Railway Co. v. Ullrich*, 213 id. 170; *Chicago City Railway Co. v. Henry*, 218 id. 92; 6 Thompson on Negligence, sec. 7318; 13 Cyc. 138-144.”

The next contention of appellee that we desire to consider is the alleged error in the giving of appellee's second, fourth, fifth, sixth, eleventh and twelfth instructions. The error alleged as to appellee's second instruction is that in instructing the jury as to the elements they should consider in determining the pre-

ponderance of the evidence it omits to mention the element of the number of witnesses. In a number of cases in the Supreme and in this court, instructions of this character which undertake to inform the jury as to the elements to be considered in determining the preponderance of the evidence and fail to include the element of the number of witnesses, have been condemned. *Yanloniz v. Spring Valley Coal Co.*, 185 Ill. App. 563; *Lyons v. Ryerson & Son*, 242 Ill. 409; *Elgin, J. & E. Ry. Co. v. Lawlor*, 229 Ill. 621; *Chicago Union Traction Co. v. Hampe*, 228 Ill. 346; *Andreicyk v. Chicago & E. I. R. Co.*, 150 Ill. App. 539.

Where the element of numbers is important, the giving of an instruction in regard to the preponderance of evidence which omits the element of numbers has been held to be reversible error. *Yanloniz v. Spring Valley Coal Co.*, *supra*; *DeJoannis v. Domestic Engineering Co.*, 185 Ill. App. 271. The giving of this instruction was clearly erroneous, but we would not be inclined to reverse the case solely on that ground, if there were no other errors in the record.

Appellee's sixth instruction directs a verdict for appellee upon proof of the facts therein stated, but this instruction omits the important element of whether or not she was a passenger on appellant's train at the time of the alleged injury. This being a controverted question, the instruction should not have been given. (*Pardridge v. Cutler*, 168 Ill. 504.)

We have examined appellee's fourth, fifth and eleventh instructions and we do not believe that they are subject to the criticism made against them by appellant.

The objection to appellee's twelfth instruction is that it submitted to the jury the question of the permanent injury to appellee. We do not understand that appellant claims that this instruction is erroneous as a matter of law, if there were competent evidence in the record to support it. We think, however, that this

Richards v. Illinois Central Railroad Co., 197 Ill. App. 282.

instruction is not objectionable and there was no error in giving it.

In this case appellant controverts all the material matters on which appellee bases her claim for damages, that is, appellant denies that appellee was a passenger on its train; that she received her injuries in the manner she claims, and further denies that the present condition of appellee's womb is referable to the alleged injury set forth in her declaration. The evidence on these matters being conflicting, the errors pointed out were prejudicial to appellant.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEARS 1915 and 1916.

United Breweries Company, Appellee, v. Joseph S. Price, Appellant.

Gen. No. 20,885.

1. CORPORATIONS, § 448*—*when contract not ultra vires*. A contract between a brewery company and a saloon keeper for the loaning of money, the securing of a license and the sale of liquor under certain conditions, being in furtherance of the business for which the company was organized, is not *ultra vires*.

2. INTOXICATING LIQUORS, § 58*—*when contract for assignment of right of renewal of license invalid*. A contract between a brewery company and a saloon keeper for the assignment by the latter to a designated third person of the alleged "right of renewal" of a saloon license which might be issued to the saloon keeper is illegal and void, as there is no right of renewal of a saloon license.

3. INTOXICATING LIQUORS, § 58*—*right of renewal of saloon license*. There is no right of renewal of a saloon license.

4. INTOXICATING LIQUORS, § 24*—*when person may not conduct saloon*. A person cannot own and conduct a saloon under a license issued to and in the name of another.

5. INTOXICATING LIQUORS, § 52*—*when right to saloon license nonassignable*. The right to a saloon license for an unexpired part of a license year, if a municipal ordinance gives such a right, inheres in the license already issued, and cannot be disconnected therefrom, and made the subject of a separate assignment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

United Breweries Co. v. Price, 197 Ill. App. 289.

6. CONTRACTS, § 134*—*when contract for operation of saloon illegal.* A contract extending over a period of seven and a half years between a brewery company and a saloon keeper for the loaning of money, the sale of liquor, the loaning of the right to a saloon license for temporary use, all future rights to remain in the brewery company or a person designated by it, constitutes a contract to operate a saloon under a license owned by another, and is consequently illegal.

7. CONTRACTS, § 134*—*when contract for purchase of liquor illegal.* A contract for the purchase of liquor by a saloon keeper from a brewery company, based upon an illegal agreement for the operation of a saloon under a license not owned or controlled by the latter, is not enforceable.

8. INTOXICATING LIQUORS, § 269*—*when brewery loaning money to saloon keeper may recover loan under contract.* A brewery company which loans money to a saloon keeper to run his business under an illegal agreement to operate a saloon under a license not owned or controlled by the latter may recover the money loaned upon noncompliance by the latter with the terms of the contract.

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed November 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

JACOB C. LeBosky, for appellant.

RINGER, WILHARTZ, LOUER & CONCANNON, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit upon a written contract. Defendant's affidavit of defense was stricken from the files and judgment entered against him for \$7,131.65. The contract, dated October 6, 1913, is signed by plaintiff, therein called "first party," and defendant, called "second party," and is in part as follows:

"Whereas, said second party desires to conduct a saloon business at Number 156 West Van Buren

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Street, Chicago, Illinois, opening the same on November 1, 1913, and desires also to purchase five thousand (5,000) barrels of beer for the conduct of said saloon business, and desires to secure the sum of Five Thousand Dollars (\$5,000.00) in cash, and also needs an assignment of the right to a saloon license for the City of Chicago, as a loan for temporary use for the specific purpose of obtaining a saloon license for the aforesaid premises for the period of six (6) months beginning November 1, 1913.

"Now, therefore, said first party, in consideration of the trade and purchases of said second party and of the prices to be paid as hereinafter provided, hereby agrees to supply to said second party, delivered upon said premises during customary business hours in the usual manner, Five Thousand (5,000) barrels of beer of good merchantable quality and of its usual grades and brands for the retail requirements of the aforesaid saloon alone.

"Said first party agrees also to furnish said second party with the sum of Five Thousand Dollars (\$5,000.00) to be paid one-half upon the signing of this agreement, receipt whereof is hereby acknowledged by said second party, and the remaining one-half, to wit: Two Thousand Five Hundred Dollars (\$2,500.00), upon the opening for business of aforesaid saloon by said second party.

"Said second party will repay to said first party the sum of Two Thousand Dollars (\$2,000.00), in accordance with the terms of fourteen (14) promissory notes, aggregating the sum of Two Thousand Dollars (\$2,000.00), of even date herewith.

"Said first party also agrees to furnish said second party with an assignment of the right to a saloon license for a period of six (6) months beginning Nov. 1, 1913, and said second party agrees and declares that the right to the assignment of a saloon license loaned and furnished, or caused to be loaned and furnished by said first party under this agreement is for temporary use, and all future rights thereunder are and shall remain the property and rights of said first party

or of such person as may be designated by the said first party.

"Said second party agrees that immediately upon issue to him by the City of Chicago of a saloon license under the right of assignment furnished as aforesaid, he will without reservation of any kind and without consideration reassign to Carl Antonsen, or such other person as said first party may designate, the right of renewal of such license and all of the rights appertaining thereto in the form satisfactory to said first party, and failing to do so said second party irrevocably appoints Albert Hahne as his attorney to make such assignment in his name, place and stead."

The defendant further agreed to maintain and operate continuously a saloon upon the premises and to purchase 5,000 barrels at the rate of not less than 50 per month. In the event of his failure to perform his covenants and agreements he was to pay plaintiff immediately the sum of \$3,000 with interest at six per cent., and any unpaid portion of his said promissory notes should become immediately due and payable; but if his covenants should be performed, the plaintiff should have no claim for the repayment of the \$3,000. The term of the contract was fixed at five years, but by a supplemental agreement was extended to seven and one-half years.

Plaintiff in its statement of claim alleges the payment of the \$5,000 and that it received defendant's promissory notes for \$2,000; that defendant has not kept his agreements in that in the month of November, 1913, he purchased only 13 barrels of beer, and during December, 1913, only 21½ barrels, and has purchased beer to be used in the above premises from persons or corporations other than the plaintiff. It claims as due the sum of \$3,000 with interest; also the sum of \$1,700 with interest, evidenced by 12 notes of the defendant remaining unpaid; also 50 cents per barrel upon 4,973 barrels of beer, being the remaining

number of barrels which were to be furnished by plaintiff to defendant under the terms of the contract.

Defendant's affidavit set up want of consideration, that the contract was *ultra vires*, that the notes were not yet due, and that plaintiff was a foreign corporation. The last-named defense was subsequently withdrawn. Upon the trial the notes were surrendered to the defendant.

The contract is not *ultra vires*. Its purpose was to advance and promote the objects for which the plaintiff corporation was organized. *Kraft v. West Side Brewery Co.*, 219 Ill. 205, is in point.

It is claimed that this contract is without consideration in that it unlawfully provides that defendant shall conduct a saloon for seven and one-half years under a license owned by plaintiff, to be loaned temporarily to defendant but transferred when plaintiff so indicated to another person designated by it.

The term of a saloon license is one year, no longer. It is said by counsel that the license year in Chicago is divided into two periods of six months each, the first period beginning May 1st, and the second or last period beginning November 1st. This contract seems to contemplate that plaintiff would cause some one with a license to assign it to defendant, who would thereupon take out a license for the last half of the year in his own name; but "immediately upon issue to him" he should assign to a person designated by plaintiff "the right of renewal of such license."

It is the settled law in this State that a contract for the assignment of the so-called right of renewal of a license is void; that there is no *right of renewal*. *People v. Harrison*, 256 Ill. 102, and *Bartkowiak v. Malinowski*, 256 Ill. 119. It follows, therefore, that the agreement that defendant should assign "the right of renewal" of any license which might be issued to him to the Carl Antonsen named in the contract, or to such other person as the plaintiff might designate,

and the power of attorney to that end, are illegal and void.

It is also the law in this State that one cannot own and conduct a saloon under a license issued to and in the name of another. *Hoyt v. McLaughlin*, 250 Ill. 442. Section 46 of article V. ch. 24, Cities and Villages Act, Ill. St. [J. & A. ¶ 1344 (46)], provides "that in granting licenses, such corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses." In section 4, ch. 43, of the Dramshop Act, Ill. St. (J. & A. ¶ 4603), it is provided that saloon licenses shall not be transferable, and in the opinion in *Hoyt v. McLaughlin*, *supra*, the court cited this section of the Dramshop Act and also a city ordinance as the basis for its holding that a person cannot operate a saloon in Chicago under a license belonging to another.

Is this a contract for defendant to operate a saloon under a license owned by some one else? We are of the opinion that it is. Plaintiff agrees to loan defendant "an assignment of the right to a saloon license * * * for temporary use, and all future rights thereunder are and shall remain the property and rights of said first party or of such person as may be designated by the said first party." There is no substantial difference between a loan of "the right to a saloon license" for the remainder of a license year, and the loan of the license itself. The right to a license for the unexpired part of a license year, if the municipal ordinance gives such a right, inheres in the license already issued in the beginning of the year and cannot be disconnected therefrom and made the subject of a separate assignment. Practically, this contract means that plaintiff should loan a license to defendant and when a new license would be issued to him he must immediately assign it to some one else, but continue buying beer from plaintiff for use in his saloon which was to be operated for seven

and one-half years apparently under no license of his own.

It is also to be noted that the provision of the contract for the reassignment of the right of renewal to Antonsen, or some other person, contains a clause that defendant shall assign to the same person "the rights appertaining" to the license issued to him, which would include the right to operate the saloon upon the premises described in the contract. In other words, defendant in the same contract has undertaken to operate the saloon for a long period of time and also to assign to another his right to operate it. The agreement of defendant to buy 5,000 barrels of beer from plaintiff is based upon the illegal agreement for the operation of a saloon under a license which he did not own or control. This contract of purchase cannot be enforced. Hence that part of the judgment which is for beer undelivered is erroneous. This amounts to \$2,470.75.

We see no reason, however, why defendant is not obligated to return the money which was loaned to him. This is not a case where both parties to the contract are engaged in a wrongful act and the rule applied that where the parties are *in pari delicto* courts will not interfere. The contract is illegal in one particular, so that the operation of a saloon by defendant as contemplated cannot be carried out. Under such circumstances he is obligated to repay the money which plaintiff advanced to him for that purpose. The part of the judgment based upon the loan of \$5,000 is proper.

The judgment is reversed and judgment is entered in this court for \$4,660.90.

Reversed and judgment in this court.

National Bank of the Republic v. Cropper, 197 Ill. App. 296.

**National Bank of the Republic of Chicago, Defendant
in Error, v. Francis Cropper, Plaintiff in Error.**

Gen. No. 21,216. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by the National Bank of the Republic of Chicago, plaintiff, against Francis Cropper, defendant, on seven promissory notes for rent drawn by defendant to order of Joseph Klor, his landlord, and by the latter indorsed in blank. From a judgment for plaintiff, defendant appeals.

Klor was accustomed to hold checks for a long time before presenting them to the bank for payment. Cropper had been Klor's tenant for years, and gave him a check for rent every month. All the checks so given had been paid by the bank and returned to Cropper except the seven checks sued on. Cropper closed his account with the plaintiff bank June 15, 1912, and sold his business to Stein. June 17, 1912, Klor had in his possession the seven checks in question. On that day he indorsed them in blank and delivered them to Struve, Cropper's manager, and for them Struve gave Klor his check on the plaintiff bank for \$641.62, the sum the seven checks amounted to. June 26, 1912, the check Struve gave to Klor was paid to Klor by the bank. Struve, by accident or otherwise, failed to deposit with the bank the seven checks he received from Cropper, and as a result his account was overdrawn about \$615. About six months after Cropper closed his bank account with the bank, the seven checks sued on were found in the drawer of a typewriter desk in the office of the Francis Cropper Company, the suc-

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cessor in business of Francis Cropper, of which company Struve was the manager. In September, 1915, Struve gave the checks sued on to the attorneys of the plaintiff bank, and told them to give the checks to the bank as security for their claim against him.

There was no evidence tending to show a direct payment of the checks by Cropper. His contention was that Klor was paid for the checks by Struve out of funds in his possession belonging to Cropper. This contention was supported at the trial only by the testimony of defendant's attorney in the cause in the Municipal Court and in this court as to an admission by Struve, and his testimony was contradicted by Struve.

T. F. MONAHAN, for plaintiff in error.

NEWMAN, POPPENHUSEN & STERN, for defendant in error; LAWRENCE A. COHEN, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 451*—*when evidence sufficient to sustain finding that notes were not paid.* In an action by a bank on several promissory notes against the maker, evidence held sufficient to sustain a finding that the notes had not been paid.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topics and section number.

Barnes v. Martin, 197 Ill. App. 298.

Edwin C. Barnes, trading as Edwin C. Barnes & Brothers, Appellee, v. William E. Martin, trading as Martin & Martin, Appellant.

Gen. No. 21,314. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. Rehearing denied January 17, 1916.

Statement of the Case.

Action by Edwin C. Barnes, trading as Edwin C. Barnes & Brothers, plaintiff, against William E. Martin, trading as Martin & Martin, defendant, for the price of two "Edison Dictating Machines" with accessory appliances, which were sold and delivered to defendant pursuant to a written order. Upon trial by the court, plaintiff had judgment for two hundred and thirty dollars, from which defendant appeals.

The order upon which the appliances were delivered was explicit as to prices and terms. Among other things it contained a provision that if the purchaser should for any reason be unable to use them they should be returned in ten days and full credit for them would be allowed. This order is dated July 22, 1914.

The appliances were delivered and used by the defendant, and it was not until September 5th that defendant notified plaintiff that the machines were not wanted.

Defendant says he is not bound by the order for the reason that his cashier, McCallister, who signed the order had no authority to do so. The said evidence showed that the latter had general charge of the office, buying supplies, signing checks, and employing and discharging some of the employees. During defend-

ant's absence from the city he was apparently the general manager of the business.

The evidence also showed that defendant contemplated leaving the city, to be gone about six weeks, and before he left, McCallister told him that he proposed to try a dictating machine in the office, and defendant consented to this.

PRINGLE & FEARING, for appellant.

FULTON, GAREY & DEUTSCHMAN, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to show relation.* In an action to recover for the purchase price of goods, where the evidence shows that the person purchasing had general charge of defendant's office, buying supplies, signing checks and employing and discharging some of the employees and acted as general manager of the business during defendant's absence from the city, and that such person had stated to defendant that he proposed to try the article in question to which defendant consented, evidence *held* sufficient to show that he acted as defendant's authorized agent in purchasing the goods in question.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Byall v. Landon, 197 Ill. App. 300.

Herschel M. Byall, Administrator, Appellee, v. F. Landon, Appellant.

Gen. No. 21,326. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. DAN W. MADDOX, Judge, presiding. Heard in this court at the March term, 1915. Reversed with finding of fact. Opinion filed January 3, 1916.

Statement of the Case.

Action by Herschel M. Byall, administrator of the estate of Harry Boyd King, deceased, plaintiff, against F. Landon, defendant, to recover for the death of plaintiff's intestate. From a judgment of \$1,500 for plaintiff, defendant appeals.

The evidence shows that defendant, who is in the teaming and hauling business, at the time in question was engaged in hauling the materials of a dismantled police station through an alley which runs easterly into Market street, Chicago, between the building occupied by the Gault House on the north, and the building of the Chicago Evening Post on the south. The alley is ten feet ten or eleven inches wide, and inclines upward from the rear of these buildings towards Market street, with "quite a grade." The materials loaded on the wagon were iron gratings and flat iron sheets about ten feet long by eight feet wide. They were loaded so as to extend an equal distance on each side of the wagon, which left a space of about eighteen inches between the edge of the load and either wall of the alley. There is evidence that the iron was tightly tied down with chains and ropes so that it could not slip.

The deceased, King, at this time was about twenty years old, and was an assistant cashier of the Post. In the early afternoon of April 23rd with a companion

he came out of the rear of the Post building into the alley and walked towards Market street, passing the loaded wagon as it stood in the alley. After standing for a time in Market street they retraced their steps down the alley way. At this time the heavily loaded wagon was moving, with four horses pulling it up the slope towards Market street. Plaintiff continued walking towards the approaching wagon and attempted to pass in the narrow space between it and the wall of the Post building. Just as he was opposite the hind wheels a wheel struck a hole in the pavement, causing the wagon to skid towards the Post building, catching and crushing plaintiff against the wall. From the injuries thus received he died shortly thereafter. At the time of the accident the wagon was nearly out of the alley.

CALHOUN, LYFORD & SHEAN, for appellant; EDWARD W. RAWLINS, of counsel.

ALDEN, LATHAM & YOUNG, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

NEGLIGENCE, § 187*—*when evidence shows contributory negligence.* In an action to recover for wrongful death alleged to have been caused by defendant's negligence, evidence examined and held to show the injury to have been caused by the negligence of plaintiff's intestate.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Supreme Lodge O. of M. P. v. Eckhardt et al., 197 Ill. App. 302.

Supreme Lodge Order of Mutual Protection, Complainant. Anna E. Eckhardt, Appellee, v. Pauline Eckhardt and Beulah Eckhardt, Appellants.

Gen. No. 21,343. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Interpleader by the Supreme Lodge Order of Mutual Protection against Pauline Eckhardt, Beulah Eckhardt and Anna E. Eckhardt, claimants, to a fund admitted to be due by said Lodge Order under a benefit certificate issued to Charles W. Eckhardt. From the decree entered on the bill awarding the fund to Anna E. Eckhardt, Pauline Eckhardt and Beulah Eckhardt appeal.

In the original benefit certificate Beulah Eckhardt, then the wife of Charles, was named as the beneficiary. In March, 1913, Beulah brought suit for divorce in the Chancery Court of Shelby county, Tennessee, charging desertion. Defendant was served and appeared by counsel. After hearing, a decree of divorce was entered finding that the court had jurisdiction and that complainant had sustained her charges by evidence, and ordering defendant to pay complainant, \$1,000 in full of alimony, which was paid. No appeal was taken and the decree is still in force. Subsequently Charles Eckhardt married Anna Marley, the other claimant herein.

Under the laws of the Lodge Order a member had the right at any time to change his beneficiary, and after his marriage to Anna, Charles surrendered his original certificate, and a new certificate was issued

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in which Anna Eckhardt was named as beneficiary. The fund which is the subject-matter of this litigation arises from the payment of this last certificate.

ALBERT H. FRY, for appellants.

ROBERT VAN SANDS, for appellee Anna E. Eckhardt.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

ESTOPPEL, § 71*—*when one invoking jurisdiction estopped to deny it.* The jurisdiction of a court of a suit for divorce cannot be questioned in a subsequent proceeding by the party at whose request and upon whose testimony as to jurisdiction of facts such court found that it had jurisdiction, especially where such party has received the benefits of the divorce litigation and rights of others have accrued thereunder, it being immaterial whether the adjudication in the divorce litigation was procured through misrepresentation of facts or misrepresentation of the law.

Frick-Reid Supply Company, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 21,350.

1. **JUDGMENT, § 672***—*when transcript of judgment insufficient to show jurisdiction in an action in foreign State.* In an action in Illinois on a judgment rendered against an Illinois corporation in a foreign State, it is error to admit in evidence a transcript of such judgment, where it not only does not show either directly or by implication that defendant was transacting business in such foreign State, but the petition in the action in such State alleges defendant to be an Illinois corporation having its principal office and place of business in Illinois and maintaining no office or place

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of business in the foreign State nor complying with the laws of the latter as to foreign corporations doing business therein.

2. CORPORATIONS, § 707*—*when recital in sheriff's return insufficient to show jurisdiction.* In an action in Illinois against a domestic corporation on a judgment rendered against such corporation in a foreign State, the recital in the sheriff's return in the latter action that he summoned defendant, "a foreign corporation, by delivering to * * * personally, Secretary of State," of such foreign State, a copy of the summons, is insufficient to show that defendant was doing business in the foreign State.

Appeal from the County Court of Cook county; the Hon. J. E. HILLSKOTTER, Judge, presiding. Heard in this court at the March term, 1915. Reversed. Opinion filed January 3, 1916.

DELAVAN B. COLE, for appellant.

VOSE & PAGE, for appellee; SAMUEL H. GILBERT, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

By this appeal is brought in review the record in an action of debt, brought by plaintiff in the County Court of Cook county to recover on a judgment rendered against defendant in the District Court of Washington county, Oklahoma. Upon trial by the court plaintiff's damages were assessed at \$914.46, and judgment thereon was entered.

In its declaration plaintiff averred that defendant was a corporation, organized and existing under and by virtue of the laws of the State of Illinois, and that in September, 1910, in the District Court of the county of Washington, in the State of Oklahoma, "the same being a court of general jurisdiction duly created and organized under the laws of said State," plaintiff recovered against the defendant the sum of \$698.37 with interest, and costs, "as by the record thereof remaining in the same court more fully appears, a transcript

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of which record is filed herewith, which said judgment still remains in full force." To this declaration defendant filed a special plea asserting that the Oklahoma court was without power to render judgment because defendant was a corporation of Illinois, maintaining its office in Chicago; that it was not served with process and had never appeared in said action nor did any one with authority ever appear for it; that it had no knowledge of said judgment until long after the date thereof; that it had never been authorized to transact business in Oklahoma and never had an office or agency there; that it was not engaged in the transaction of business in Oklahoma, and had never rendered itself amenable to the laws of said State as a foreign corporation doing business therein.

It is not claimed by plaintiff that defendant was served with process in Oklahoma by summons or by any method known to the laws of Illinois.

Upon the trial in the Illinois court plaintiff offered a certified transcript of the record of the Oklahoma judgment. Defendant objected to this on the ground that it showed upon its face that defendant was not a citizen of the State of Oklahoma but was a foreign corporation at the time of the commencement of the action in that State, and that it did not affirmatively show that defendant was transacting business in that State at or prior to the time the suit was brought, and that it did not show facts sufficient to confer jurisdiction on the Oklahoma court. The court admitted the transcript in evidence subject to objection, to which the defendant excepted. Thereafter defendant moved to strike the transcript from the record. The court overruled said motion and the defendant excepted, and this action of the court is assigned for error here.

We hold that the trial court was in error in its rulings upon the transcript of judgment. It does not show upon its face either directly or by implication that the defendant was transacting business in the

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State of Oklahoma. The petition filed in the Oklahoma court alleges that the defendant is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in Chicago, and that it maintains no office or place of business in the State of Oklahoma and never has maintained such an office, and has not complied with the laws of the State of Oklahoma relating to foreign corporations doing business in that State. Such allegations did not amount to an averment that the defendant was transacting business in Oklahoma.

In *Henning v. Planters' Ins. Co.*, 28 Fed. 440, the allegations of the declaration and the transcript of the judgment were similar to those in the instant case, and the court there said:

"It is a general rule that a special jurisdictional fact outside the ordinary and intrinsic situation of the thing shall be specially averred in pleading, and certainly that which is contrary to the ordinary course of things should be averred, to give the court knowledge of the fact."

In *St. Clair v. Cox*, 106 U. S. 350, the court speaking through Mr. Justice Field, said:

"It is sufficient to observe that we are of the opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation was engaged in business in the State."

In *Hazeltine v. Mississippi Valley Fire Ins. Co.*, 55 Fed. 743, the transcript did not affirmatively show the jurisdictional fact that the defendant was "transacting business" in the State, and it was held that the provision of the statute by which substituted service is authorized to be made upon an insurance commis-

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sioner can only be supported in case the defendant "is at the time of the suit, or had previously been, 'doing business' in the State."

The recital in the sheriff's return that he summoned the defendant, "a foreign corporation, by delivering to Bill Cross, personally, Secretary of State, of the State of Oklahoma," a true and certified copy of the summons, is not sufficient to establish the fact that the defendant was transacting business in the State of Oklahoma. In *St. Clair v. Cox*, *supra*, it is said: "The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded." And in the *Henning* case, *supra*, is very pertinent language, as follows:

"The sheriff may choose to serve anybody as agent; and wherever the suit be brought he could assume that any convenient person was 'agent'; and if that simple return imports that the foreign corporation was 'doing business' within the State, and that the person served was a proper 'agent' to represent it the whole jurisdiction would depend upon what may be a fallacious inference; for, in the nature of the thing, it does not essentially import that fact."

In *Cunningham v. Spokane Hydraulic Co.*, 18 Wash. 524, the court held that the judgment roll itself must affirmatively show jurisdiction in this class of cases; and in *Black on Judgments*, vol. 2, sec. 910, the matter is summed up as follows:

"It is a well established rule of interstate or international law that the courts of another State will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that State. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an 'agent' of the company."

Frick-Reid Supply Co. v. Consolidated Adjust. Co., 197 Ill. App. 303.

We concede the contention of plaintiff that whatever is included in or necessarily implied from express allegations need not be otherwise averred, but as we have indicated above there is no language in the declaration or transcript from which it may be implied that defendant was doing business in Oklahoma. The transcript of the record covering the judgment of the Oklahoma court failing to show affirmatively any jurisdictional facts, except that what is shown rather tends to negative jurisdiction of the defendant by the Oklahoma court, the objection to its jurisdiction as evidence should have been sustained, and it was error for the trial court to deny the motion of defendant to strike it from the evidence. The transcript being stricken there would remain no case for the plaintiff.

Other points have been raised and discussed, but in view of our holding as above we do not think it necessary to comment upon them.

Without a sufficient transcript of the record plaintiff cannot recover; hence the judgment below is reversed and judgment of *nil capiat* will be entered here.

Reversed.

**Ruth Whitney, by Arthur A. Whitney, Appellee, v.
Frank N. Derby and William M. Derby, Jr., Appel-
lants.**

Gen. No. 21,358. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed January 8, 1916.

Statement of the Case.

Action by Ruth Whitney, by Arthur A. Whitney, her father and next friend, plaintiff, against Frank N. Derby and William M. Derby, Jr., defendants, for injuries received by the fall of a stone railing. There was a verdict for plaintiff for \$1,250, which, on the suggestion of the trial court, was remitted to \$650. From this judgment, defendants appeal.

The evidence showed that plaintiff was injured by a stone railing falling on her as she was playing on the front steps of a building where she lived, which building was owned by the defendants. In her declaration she alleged that this stone railing was suffered by the defendants "to be loose, so that it was likely to fall over," and that "while plaintiff was about to enter said premises, in passing upon and along said steps in dangerous proximity of said stone slab or railing, without any fault or negligence on her part, by reason of the carelessness and negligence of the defendants, and each of them, aforesaid, the said stone slab or railing fell or toppled against and upon the said plaintiff." There was evidence that plaintiff "rocked" the stone back and forth, though warned of the danger at the time, and finally pulled it over on her.

WARREN PEASE, for appellants.

Otterbeck v. Larson, 197 Ill. App. 310.

COBURN & BENTLEY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 230*—*when landlord not liable for injury to child of tenant.* In an action by an infant child of a tenant against a landlord to recover for injuries by the falling of a railing, evidence examined and *held* to show that injury was caused by negligence of plaintiff.

2. DAMAGES, § 122*—*when verdict excessive.* A verdict of \$1,250 for scratches or abrasions on plaintiff's leg, from which she quickly recovered, is so excessive as to indicate that the jury were moved by prejudice and sympathy, and the judgment will not be allowed to stand even though plaintiff remitted all in excess of \$650.

Emil Otterbeck et al., Appellees, v. Evans Larson, Appellant.

Gen. No. 21,368. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed January 3, 1916.

Statement of the Case.

Suit by Emil Otterbeck and others, beneficiaries under the will of Lauritz Mortensen, against Evans Larson, trustee under the will, for an accounting.

On August 24, 1908, Lauritz Mortensen died. The evidence showed that by the will it was provided that after the payment of debts and funeral expenses

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

\$1,500 should be paid to defendant; that defendant should take possession of all the rest and residue of the estate and hold it in trust for a period of five years, with power to rent, repair and sell, "and to do whatever else he deems best for the interest of said estate," compensation to be paid defendant for managing said estate at the rate of three per cent. at the end of each year on the fair cash value of said estate. He was not required to give bond. The will further provided that at the end of five years after the death of the testator said estate should be divided equally among Anna Marie Larson, wife of the defendant and niece of the testator, Lotta Nelson, a niece of the testator, Emil Otterbeck, a nephew, Edward Otterbeck, a brother, and Mathilda Otterbeck, wife of Edward. Defendant was appointed executor of the will without bond.

On May 4, 1911, the above named beneficiaries, except Anna Marie Larson, filed their bill in chancery, charging that said defendant as trustee had received considerable sums of money of the estate and had converted the same to his own use; that he had concealed trust property and was insolvent and not under bond. They prayed among other things that he be required to set forth a true and perfect account of all the trust funds and be decreed to pay what is due from him. Answer and replication were filed, and on November 13, 1911, the court entered an order finding that the said defendant had never rendered an account of the trust property to the beneficiaries, and ordered that the cause be referred to a master in chancery to take an account of all the trust property. The master heard evidence and filed his report with his conclusions, and stated the account of the trustee, finding the net balance due from him to be \$6,403.75. The defendant filed objections to this report, which afterwards by order stood as exceptions. The complainants filed no objections or exceptions. Subsequently the court entered a decree overruling all exceptions to the

Otterbeck v. Larson, 197 Ill. App. 310.

report and confirmed the same except as to certain items. From this decree, defendant appeals.

ERNEST R. FIFER, for appellant; JENNINGS & FIFER, of counsel.

WILLIAM REEDA, for appellees; PARK PHIPPS, of counsel.

MR. PRESIDING JUSTICE MCSURLEY delivered the opinion of the court.

Abstract of the Decision.

1. TRUSTS, § 222*—*when allowance to trustee for litigation improper.* Attorneys' fees and expenses of a trustee in a litigation attacking the constitutionality of the Act of 1909, bringing trusteeships under jurisdiction of the Probate Court, held not properly allowed because not for the interest of the trust estate.

2. TRUSTS, § 222*—*when allowance improper.* Allowance to trustee of \$50 for attorneys' fees improper where the trustee had already obtained sound and correct advice on the subject from another attorney.

3. TRUSTS, § 222*—*when allowance of fees in criminal proceeding against trustee improper.* Allowance of attorneys' fees in criminal prosecution against trustee properly disallowed as not being for benefit of trust estate.

4. TRUSTS, § 222*—*when allowance of solicitors' fees improper.* Allowance of solicitors' fees in proceeding made necessary by unreasonable refusal of trustee to give proper information to beneficiaries as to management of trust estate and by his improper disposition of considerable portions of trust funds properly disallowed.

5. TRUSTS, § 221*—*when credit properly not allowed to trustee.* In an action for the beneficiaries against the trustee of an estate for the conversion and concealment of trust property of an estate under which he received a legacy, the fact that if defendant should account for all of the personal property of the estate there would be left, after the payment of all claims and costs, a balance applicable to the payment of his legacy, does not entitle him to be credited in his trusteeship account with the deficit between the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

amount of the legacy and the amount which could be credited thereto.

6. TRUSTS, § 230*—*when credit for interest improperly allowed.* Credit for an overcharge for interest based on an allowance improperly made to trustee should not be allowed.

7. EQUIT, § 431*—*when rights waived by failure to object or except.* In a suit by the beneficiaries of a will against the trustee for an accounting which is referred to a master to take account of the trust property, where complainants make no objection before the master as to certain items of credit and no exceptions to the court to the allowance of these items, they cannot be questioned on appeal.

8. TRUSTS, § 221*—*when trustee not entitled to credit for difference between the amounts collected and amounts for which sale could be made.* In a suit by the beneficiaries under a will against the trustee for an accounting where it appeared that defendant sold accounts of the estate, but that the beneficiaries objected to the sale on the ground of the amount received therefor, and that thereupon the trustee recalled the sale and subsequently was able to collect only a smaller amount, he is not entitled to a credit for the difference between the amount for which the accounts could have been sold by him and the amount collected.

9. TRUSTS, § 233*—*when investment not exercise of reasonable discretion.* Evidence examined and held to show that an investment claimed by the trustee to have been made in securities of a foreign corporation was not proven, if made, was not in exercise of sound judgment and reasonable discretion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ward et al. v. Gartside et al., 197 Ill. App. 314.

**Alfred D. Ward and Thomas D. Warren, Appellants,
v. John M. Gartside and Annie L. Gartside, Ap-
pellees.**

Gen. No. 21,383. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOOSRY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Alfred D. Ward and Thomas D. Warren, complainants, to foreclose a mortgage made by John M. Gartside and Annie L. Gartside, defendants. Defendants answered and Annie L. Gartside filed a cross-bill praying that the mortgage be declared void. The court decreed that the bill be dismissed for want of equity and that the prayer of the cross-bill be granted. From this decree, complainants appeal.

The evidence showed that Lawrence J. Haughton of Asheville, North Carolina, died owning several thousand acres of land in Jones county, North Carolina. By his will E. L. Haughton and W. M. Jones were appointed executors and were given "full power to sell my plantation in Jones County known as Ravenswood and to make a deed for the same." E. L. Haughton died before the occurrence of the transaction in question. Jones, as surviving executor, by an instrument in writing executed by him on August 28, 1909, gave to complainants, who resided in North Carolina, an option to purchase some 18,000 acres of land belonging to the Lawrence J. Haughton estate. By its terms the executor promised that upon payment to him of \$100,000 on or before November 1, 1909, he would deliver a deed to the holders of the option; the option could be and was extended to January 1, 1910, under

certain of its provisions. On November 16, 1909, this option was assigned by complainants to the defendant John M. Gartside, who in consideration for such assignment agreed to pay or to secure the payment of \$10,000, and on December 21, 1909, a mortgage was executed by defendants and delivered to complainants, which mortgage complainants seek to foreclose.

Among other matters presented by defendants' answer and by the crossbill, it was asserted that the mortgage was void for want of consideration, in that under the laws of North Carolina, Jones the executor, had no power to give an option to purchase the lands of the Haughton estate.

CHURCH, SHEPARD & DAY, for appellants; WILLIAM T. CHURCH, of counsel.

CHARLES H. ALDRICH, for appellees.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 122*—*when giving of option not within power of executor.* An executor has no power to give an option for the sale of real property of the estate.

2. COURTS, § 152*—*what not obiter dictum.* An expression of an opinion upon a point of a case argued by counsel and passed upon by the court is not *obiter dictum*.

3. JUDGMENT, § 578*—*when decision of foreign State as to real property therein controlling.* The decision of the supreme court of a foreign State on a contract made within the State between its citizens touching land within the State is controlling.

4. MORTGAGES, § 412*—*when lack of consideration defense.* Where a mortgage given for an option is not enforceable against the person giving it, it is without consideration and cannot be enforced by an assignee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Margolis v. Chicago City Railway Co., 197 Ill. App. 316.

Bernard Margolis, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,385. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed January 3, 1916.

Statement of the Case.

Action by Bernard Margolis, plaintiff, against Chicago City Railway Company, defendant, to recover for injuries alleged to have been received by being struck by defendant's car. From a judgment for plaintiff for \$2,000, defendant appeals.

The evidence shows that about 10 a. m. on March 30, 1912, plaintiff while driving a horse and wagon southward on State street near 13th, was struck by a southbound street car belonging to defendant.

Plaintiff's wagon had an inclosed top with doors on the front, sides and rear. Plaintiff was accustomed to driving in the streets of Chicago, and was familiar with the locality where the accident happened. Plaintiff testified that he drove into the southbound tracks, and after driving there for about four minutes the street car unexpectedly came rapidly from the north and struck his wagon as he was attempting to pull out of the tracks towards the west. Defendant contended that as the car approached 13th street the gong was being rung; that plaintiff was then driving between the southbound track and the west curb of the street; that when plaintiff reached 13th street he suddenly turned eastward into the track in front of the car, then seeing the car he attempted to turn back but before he could do so the wagon was struck and upset; that the car's speed did not exceed six or eight miles an hour; that it stopped within a very few feet after the colli-

Margolis v. Chicago City Railway Co., 197 Ill. App. 316.

sion. Defendant claimed that plaintiff was guilty of contributory negligence and that it was not guilty of negligence. The court refused defendant's request to give an instruction stating the degree of care which it was required to exercise.

B. F. RICHOLSON and WATSON J. FERRY, for appellant.

MORTON J. STEVENSON, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. *STREET RAILROADS, § 142*—when instruction as to degree of care proper.* In an action against a street railroad company to recover for injuries by collision with a street car, where an instruction as to the degree of care required of plaintiff and defendant has not been given, it is error to refuse defendant's request to give an instruction that:

"You are instructed that the crew of the car in question were not required to exercise the highest degree of care to avoid injuring the plaintiff on the occasion in question, but were only required to exercise ordinary care; and if you believe from the evidence in this case, under the instructions of the court, that as the car approached the place of the accident it was being operated with ordinary care, and that the motorman of the car in question, in the exercise of reasonable and ordinary care, did all he could to avoid the accident in question as soon as it was apparent or ascertainable to him, in the exercise of reasonable and ordinary care, that the wagon in question was upon the track, or getting upon or near the track into a position of danger, then the plaintiff cannot recover in this case."

2. *APPEAL AND ERROR, § 1560*—when refusal to give instruction improper.* Refusal to give an instruction requested by defendant in regard to personal interest in the case of witnesses is improper where such instructions have been given on behalf of plaintiff.

3. *DAMAGES, § 128*—when verdict excessive.* Where the evidence tends to show in an action for personal injuries that the only injury received by plaintiff was a sprained ankle, from which he soon recovered, a verdict of \$2,000 held to indicate that the jury were actuated by passion and prejudice.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Greenberg v. Reinken, 197 Ill. App. 318.

**David Greenberg et al., Appellants, v. Dietrich
Reinken et al., Appellees.**

Gen. No. 21,436.

MECHANICS' LIENS, § 56*—*when right enforceable by partnership containing a licensed member.* The fact that a member of a plumbing partnership is not licensed in accordance with the Act of July 1, 1897 (J. & A. ¶ 8530), does not operate to prevent the enforcement of a mechanic's lien for plumbing work, where one partner was a licensed plumber.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed January 3, 1916.

HAROLD J. FINDER, for appellants; ROBERT W. MILLAR, of counsel.

GEORGE W. STOCKWELL, for appellees.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

By this appeal complainants seek to have reversed a decree dismissing for want of equity their bill filed to enforce a mechanic's lien for plumbing work.

We are not favored with any brief or argument on behalf of the defendants.

The cause was referred to a master in chancery with instructions to take and report the evidence "together with his conclusions of fact and of law thereupon." He found and reported that David Greenberg and Abe Levinson were in business as partners; that the work in question had been performed under an agreement with them, for which they had been paid in part, and that there was a balance unpaid of \$791.50 with interest; that Greenberg was a licensed plumber and that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Levinson was not. The master concluded as a matter of law that because Levinson was not a licensed plumber the complainants are not entitled to recover, and he recommended that their bill be dismissed. Exceptions to the report having been overruled, the court entered a decree dismissing the bill.

Shall complainants be denied a lien because Levinson was not a licensed plumber? The act providing for the licensing of plumbers and for the inspection of plumbing, in force July 1, 1897, ch. 24, Illinois Statutes (Hurd), p. 411 (J. & A. ¶ 8530), provides that "any person now or hereafter engaged in or working at the business of plumbing * * * shall first receive a certificate thereof, in accordance with the provisions of this act." Then follow provisions for an examining board to examine any person desiring to become a plumber as to his practical knowledge of plumbing, house drainage, etc., and if the board is satisfied that the applicant is competent it shall issue a certificate to him authorizing him to engage in the business of plumbing. A penalty is provided for any violation of the act.

In *Douglas v. People*, 225 Ill. 536, the constitutionality of this act was upheld as an act "for the protection of the health, comfort, safety or welfare of society."

It appears from the evidence that in the conduct of complainants' business Greenberg had exclusive charge of supervising the plumbing work, making sketches for the installation and laying out the job, and had charge of the practical part of the work; that Levinson was not a plumber and never did any plumbing work and was not familiar with it and had no charge or supervision over it; that his duties were mainly connected with office work and bookkeeping, tending to the payment of bills with supply houses, keeping the pay roll book with the names of employees, and tending to the distribution of their pay envelopes;

that he also did the collecting; that he had nothing to do with the actual plumbing work done by the firm, either in planning or construction.

We do not find a decision in any case in this State directly in point. In *Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83, the Court of Appeals had under consideration a case involving facts almost identical with those now before us, with the additional fact that under the New York statute it was provided that "each and every member of the firm shall have been registered." In that case, as here, only one of two members of the firm was registered and he attended to the plumbing work. The other member was the financial man, who was not registered. The majority of the court held that this provision of the statute was invalid, saying:

"It prohibits a business man, with financial means and business ability, and a registered master plumber, with the requisite mechanical skill, from uniting the financial and business ability of the one with the energy and mechanical skill of the other in a partnership for conducting a legitimate business. The right to form partnerships for the conduct of business has existed from time immemorial and any interference with that right must be regarded as an unwarranted interference with individual freedom condemned by the Constitution. The feature of the statute to which I have referred would deprive a firm engaged in the plumbing business, composed of half a dozen persons, from enforcing contracts and collecting their bills for work done unless they could show that each and every member of the firm was a registered plumber, and if, as in this case, it was impossible for one of them to become registered, the firm must dissolve. A law that produces such results in its operation cannot be valid."

There is a minority opinion concurring in the judgment by the majority, but on the ground that under the facts in the case the statute did not apply, the minority opinion saying that the unlicensed partner

"may contribute his capital, or his clerical services, to the business concern and become a partner and, if not a plumber, nor proposing to act as a master plumber in the undertaking of the concern, the act has no reference to him."

On November 11, 1756, Lord Mansfield took his place as Lord Chief Justice of the Court of King's Bench. The first case in which he pronounced judgment was *Raynard v. Chase*, reported in volume 1 of Burrow's Reports, page 2. The case before the court was an action of debt for a penalty under a statute for exercising the trade of a brewer without having served an apprenticeship. In pronouncing judgment Lord Mansfield stated principles so applicable to the instant case that we quote somewhat in full. After finding that the defendant was to share the profits with his partner and was liable for the debts of the partnership but "never acted in or exercised the trade," Lord Mansfield proceeded:

"1st. This is a penal law; 2ndly, It is in restraint of natural right, and 3dly, It is contrary to the general right given by the common law of the kingdom: I will add, 4thly, The policy upon which the act was made has from experience become doubtful. Bad and unskilful workmen are rarely prosecuted. * * * The general policy of the act was to have trades carried on by persons who had skill in them. Now here the personal skill of the defendant makes no real difference in the case. For the person who is skilful, acts everything, and receives no directions from this man; he neither did, nor was to interfere * * *. In many considerable undertakings, it is absolutely necessary to take in persons as partners to share the profits and risque the loss. And the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce, and the manner of carrying them on. It is notorious that many partnerships are entered into, upon the foundation of one partner contributing industry and skill, and the other money."

Bentley, Murray & Co. v. LaSalle St. T. & S. Bk., 197 Ill. App. 322.

The reasoning of these cases is based on considerations of justice. It manifestly would be unjust to deprive complainants of compensation for their work merely because one of the partners, who does only the clerical or office work, is not a licensed plumber. Complainants are entitled to their lien, and the decree is reversed and the cause remanded with directions to enter a decree giving complainants a lien in accordance with the prayer of their bill for the amount which the master found to be unpaid, with interest as stated in the master's report.

Reversed and remanded with directions.

**Bentley, Murray & Company, Plaintiff in Error, v.
LaSalle Street Trust & Savings Bank, Defendant
in Error.**

Gen. No. 21,091.

1. **BANKS AND BANKING, § 146***—*when payment of check on forged indorsement constitutes conversion.* A bank paying a check drawn on it on a false or forged indorsement is liable to the payee for conversion.

2. **TROVER AND CONVERSION, § 11***—*when maintainable for negotiable paper.* Trover may be maintained for notes and bills.

3. **TROVER AND CONVERSION, § 47***—*what measure of damages for conversion of negotiable paper.* In an action of trover for notes and bills, the measure of damages is, prima facie, the amount of the face value of the paper.

4. **BILLS AND NOTES, § 154***—*when forged indorsement does not pass title.* A forged indorsement does not pass title to commercial paper negotiable only by indorsement and does not justify the payment of such paper.

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the March term, 1915. Reversed and judgment here. Opinion filed January 3, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bentley, Murray & Co. v. LaSalle St. T. & S. Bk., 197 Ill. App. 322.

MAYER, MEYER, AUSTRIAN & PLATT, for plaintiff in error.

WILLIAM S. MILLER and F. H. BENDEL, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment of *nil capiat* rendered in an action by plaintiff in error, a corporation, against defendant in error for the conversion of three checks, amounting in all to \$354, drawn by George Kleine to the order of plaintiff on defendant's predecessor, the La Salle Street National Bank. The checks were the property of plaintiff and were paid by the bank on which they were drawn and returned to the drawer. They were indorsed in the name of the plaintiff by one Robertson, who had no authority to indorse the same. The custody of the checks was delivered by Kleine to the plaintiff to enable the plaintiff to introduce the same in evidence at the trial of the cause. The defendant bank took over the assets and assumed the liabilities of the La Salle Street National Bank.

The controlling question in the case is whether the La Salle Street National Bank, having acquired possession of the checks through false or forged indorsement, was liable to the payee for their conversion. The principal contention of defendant in error is that there was no conversion by its predecessor, the La Salle Street National Bank, of the checks, or misappropriation of the proceeds thereof.

We are of the opinion that when Robertson handed a check to the La Salle Street National Bank and was paid the amount thereof, the bank converted such check. In *McCombie v. Davis*, 5 East, 538, 540, Lord Ellenborough said:

Bentley, Murray & Co. v. LaSalle St. T. & S. Bk., 197 Ill. App. 322.

“A man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it. For what is that but assisting that other in carrying his wrongful act into effect?”

Trover may be maintained for notes and bills, and the measure of damages is *prima facie*, the amount of their face. It is well settled that a forged indorsement does not pass title to commercial paper negotiable only by indorsement and does not justify the payment of such paper. *Graves v. American Exchange Bank*, 17 N. Y. 205; *People v. Bank of North America*, 75 N. Y. 547; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Shaffer v. McKee*, 19 Ohio St. 526; *Fine Arts Society v. Union Bank*, 12 Q. B. Div. 705; *Rauch v. Fort Dearborn Nat. Bank*, 223 Ill. 507.

In *Williams v. Wall*, 60 Mo. 318, the plaintiff was the owner of a draft, which one Bailey won from him at gambling. Bailey indorsed it over to the defendant, who had knowledge of the facts. The defendant collected the proceeds of the draft and the plaintiff sued him in conversion. The statute of Missouri makes absolutely void the indorsement of negotiable instruments made in connection with gambling transactions.

The court said:

“A wrongful taking or assumption of a right to control or dispose of property constitutes a conversion; indeed any wrongful act which negatives or is inconsistent with the plaintiff’s right is *per se* a conversion. * * * The authorities are not wanting * * * that the same liability attaches to the unauthorized act, whether the actor was conscious of the wrong he was committing or not.”

To the same effect is *Chapin v. Dake*, 57 Ill. 295, where Dake lost in gambling two drafts for \$1,000 each, indorsed the same and delivered them to Donaldson, and they subsequently came into the hands of Chapin & Gore, indorsees and bona fide holders, and it was held that the indorsement of the drafts was void, and that the property in them was still in Dake.

Bentley, Murray & Co. v. LaSalle St. T. & S. Bk., 197 Ill. App. 322.

In Brannan's Negotiable Instruments Law (2nd Ed.), in a note to section 189, the author refers to the case of *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, and says:

"A drawee bank paid and charged to the account of the drawer checks indorsed by an agent of payee who had no authority to indorse or collect checks, and who appropriated the money. Held, that the bank was not liable to the payee in assumpsit for money had and received. * * * It would seem that the plaintiff misconceived his remedy and that he should have sued the bank for conversion of checks belonging to him. *Ellery v. People's Bank*, 114 N. Y. Supp. 108."

The cases cited and relied on by counsel for appellee; *National Bank of Republic v. Millard*, 10 Wall. (U. S.) 152, *First Nat. Bank v. Whitman*, 94 U. S. 343, and *Rauch v. Bankers Nat. Bank*, 143 Ill. App. 625, are all cases where the payee of the check brought assumpsit, and it was held that because of the lack of contractual relations between the payee and drawee assumpsit could not be maintained, and have no application to a case where the payee alleges the conversion of the checks.

In our opinion the plaintiff is entitled to recover from the defendant the amount of the checks and interest thereon, and the judgment is reversed and judgment entered here for \$450.35 and the costs in this court.

Reversed and judgment here for four hundred and fifty dollars and thirty-five cents (\$450.35).

Chicago Savings Bk. & Trust Co. v. Cohn, 197 Ill. App. 326.

**Chicago Savings Bank & Trust Company, Complainant.
Northern Trust Company, Executor, Appellant, v.
Louis M. Cohn, Appellee.**

Gen. No. 21,254.

1. GIFTS, § 30*—*what requisite to constitute gift causa mortis.* To constitute a valid gift *causa mortis* it must have been made with a view to the donor's death from present illness, or from external and apprehended peril, the donor must die of that ailment or peril, and there must be a delivery.

2. GIFTS, § 34*—*when delivery to third person sufficient.* The delivery to a third person for the benefit of the donee is as effective as though it had been made directly to the donee.

3. GIFTS, § 34*—*when third person presumed to be trustee of donor.* The third person to whom delivery is made for the benefit of the donee is presumed, in the absence of a contrary showing, to be the trustee of the donor.

4. GIFTS, § 30*—*when acceptance presumed.* Where a gift is beneficial to a donee and imposes no burden upon him, acceptance by him is presumed as a matter of law.

5. GIFTS, § 30*—*when bank book subject of gift causa mortis.* A savings bank book is a proper subject of donation *causa mortis*.

6. GIFTS, § 37*—*when evidence of written instrument and declarations by donor admissible.* In a proceeding to establish a gift *causa mortis* of a savings bank book, a document written by the donor and placed in her safety deposit box stating a gift of the book to the claimant and evidence of declaration of the donor to a third person of the gift to the claimant, while not sufficient to establish the gift, are admissible in corroboration of other evidence tending to establish it.

7. GIFTS, § 34*—*when delivery at time of gift causa mortis essential.* Delivery at the time of making of the gift *causa mortis* is essential to establish the *factum* of a gift *causa mortis*, delivery and not possession being material.

8. GIFTS, § 37*—*when circumstantial evidence admissible to show delivery of possession.* Delivery of possession may be proved by circumstantial evidence in a proceeding to establish a gift *causa mortis*.

9. GIFTS, § 37*—*when evidence insufficient to establish gift causa mortis.* In a proceeding to establish a gift *causa mortis* of a bank

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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book, evidence examined and *held* insufficient to establish a gift *causa mortis*.

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed January 3, 1916. *Certiorari* denied by Supreme Court (making opinion final).

CULVER, ANDREWS, KING & COOK, for appellant.

MANCHA BRUGGEMEYER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The question presented by the record is the validity of an alleged gift *causa mortis* by Regina Watson to her brother, Louis M. Cohn. Mrs. Watson died July 31, 1913. She had on deposit in the Chicago Savings Bank & Trust Company funds amounting, with interest to the date of her death, to \$2,231.56, and had a savings bank pass book in which the deposit of such funds was entered. The bank book and the fund represented thereby were claimed by Louis M. Cohn as donee and by the Northern Trust Company as executor of the will of Mrs. Watson. The Savings Bank filed its bill of interpleader against the claimants of the fund. An interlocutory decree of interpleader was entered and the claimants answered the bill, each claiming the fund and denying that the other was entitled to it. The court by its decree found that Louis M. Cohn was the owner of the fund and entered a final decree in his favor. From that decree the executor prosecutes this appeal.

Cohn introduced two items of documentary evidence and his own testimony and that of one other witness, Miss Lunt. Mrs. Watson went to St. Luke's Hospital July 28th for an operation and died there July 31st. Miss Lunt testified that July 26th Mrs. Watson told her she was going to leave her house, lot and money to

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her brother, Louis M. Cohn; that witness saw her but once afterwards, that was the day before she died; that she was then very low and they had no talk with each other; that after she left Mrs. Watson's room she went to the room of the wife of Louis M. Cohn in the hospital, and Mrs. Cohn gave witness a ring that she said Mrs. Watson had asked her to give to witness, and told her that Mrs. Watson had given her "a book, a package" to give to her husband. Mr. Cohn testified that he received the savings bank pass book from his wife at St. Luke's Hospital immediately after the death of Mrs. Watson. The documents introduced in evidence were, first, the pass book, and, second, the following document:

"Chicago.

"I give and bequeath to my brother Louis M. Cohn, of Chicago, the contents of my savings Bank Book No. 1725 of the Chicago Savings Bank & Trust Company containing the sum of Twenty-two hundred and thirty-one Dollars and Fifty-six Cents.

Regina Watson.

Witnessed by

Helen G. Carpenter,

Hubbard Woods, Ill.

Chicago, July 28, 1913."

This document, it is admitted, was written by Mrs. Watson and placed in a safety deposit box rented by her, where it was found by the executor when the box was opened after her death.

"To constitute a valid gift *causa mortis* three things are essential. It must be made (1) with a view to the donor's death from present illness, or from external and apprehended peril; (2) the donor must die of that ailment or peril; (3) there must be a delivery." 3 Wait's Actions and Defenses, 502. The evidence establishes two of the requisites of a valid gift *causa mortis*, viz.: Impending death from present ailment, and that the donor died of that ailment. The control-

ling question in the case is as to the third requisite, and our conclusion must turn on the question whether the facts constitute or show a valid delivery of the property. We agree with the contention of appellee that in determining this question the following rules of law are applicable: (1) The delivery to a third person for the benefit of the donee is as effective as though it had been made directly to the donee. *Devol v. Dye*, 123 Ind. 321; *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 52 N. E. 465. (2) The person to whom the delivery is made is presumed, in the absence of a contrary showing, to be the trustee of the donor. *Varley v. Sims*, 100 Minn. 331, 8 L. R. A. (N. S.) 828; *Johnson v. Colley*, 101 Va. 414. (3) When a gift is beneficial to a donee and imposes no burden on him, acceptance by him is presumed as matter of law. *Varley v. Sims, supra*. (4) A savings bank book is a proper subject of a donation *causa mortis*. *Van Wagenen v. Bonnot*, 72 N. J. Eq. 143, 65 Atl. 239. (5) The person to whom the delivery is made is presumed, in the absence of a contrary showing, to be the trustee of the donor. *Varley v. Sims, supra*; *Johnson v. Colley, supra*.

The document written by Mrs. Watson and placed in her safety deposit box, and the testimony of Miss Lunt as to the declaration of Mrs. Watson, are not sufficient to establish the gift, but they are admissible in corroboration of other evidence tending to establish the gift. *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684. There is no direct evidence in the record of a delivery of the pass book to Mrs. Cohn. She had it in her possession immediately after the death of Mrs. Watson, and Miss Lunt testified that the day before she delivered to witness a ring which she said Mrs. Watson had asked her to give to witness, and that Mrs. Cohn said Mrs. Watson had given her "a book, a package," for her brother. Mrs. Watson was very low and unable to talk when Miss Lunt saw her the day before her death. Mrs. Cohn was her sister-in-law

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and occupied a room adjoining the one occupied by Mrs. Watson. She might properly have taken into her custody any article of value which Mrs. Watson had in her room, and the fact that she had in her care and custody the pass book does not prove that the book was delivered to her by Mrs. Watson.

Delivery at the time of making a gift is essential to establish the *factum* of a gift *causa mortis*. It is not the possession of the donee, but the delivery to him that is material. *Dickeschied v. Exchange Bank*, 28 W. Va. 340. Delivery of possession, like any other fact, may be proved by circumstantial evidence; but in this record there is no evidence, either direct or circumstantial, that proves delivery of possession of the book or the fund thereby represented by Mrs. Watson to Mrs. Cohn, and the evidence therefore, in our opinion, is insufficient to establish a gift of the pass book as a gift *causa mortis*.

The decree of the Superior Court is reversed and the cause remanded to that court with directions to enter a decree that the fund of \$2,325.70 deposited with the clerk of that court by the complainant, the Chicago Savings Bank & Trust Company, is the property of the Northern Trust Company as executor of the will of Regina Watson, deceased, and directing that the clerk pay over to said executor said fund of \$2,325.70, and that said Northern Trust Company, executor, etc., recover of said Louis M. Cohn its costs in said Superior Court.

Reversed and remanded with directions.

Howard S. Gemmill, Administrator, Appellant, v. Peoples Gas Light and Coke Company et al., Defendants. Annie E. Smith, Executrix, Appellee.

Gen. No. 21,272.

1. ABATEMENT AND REVIVAL, § 3*—*when cause of action survives against personal representative.* The cause of action under the Campbell Act survives against the personal representative of the person whose wrongful act caused the death.

2. ABATEMENT AND REVIVAL, § 65*—*when right of action survives against surviving defendant.* Under sections 12 and 13 of the Abatement Act (J. & A. ¶¶ 12, 13), in a case of two defendants, the right of action, if the cause of action survives, survives against a surviving defendant and not against the personal representative of the deceased defendant.

McSURELY, P. J., dissenting.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

EARL J. WALKER, for appellant.

BULKLEY, MORE & TALLMADGE, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

September 26, 1912, Hans Hanson was killed through the alleged negligence of Alanson D. Smith and the Peoples Gas Light and Coke Company. February 26, 1913, Gemmill as administrator of Hanson brought his action in the Superior Court of Cook county under the Campbell Act against Smith and the gas company. The gas company was not served with process until April 1, 1914. February 27, 1914, more than a year after the death of Hanson, Smith died. June 30th, plaintiff suggested the death of Smith and a summons was issued to Grundy county for his executors and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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served on Annie E. Smith, one of the executors of his will. She filed a plea setting up her residence in Grundy county; that Alanson D. Smith died February 24, 1914, more than a year after the death of Hanson, and while the gas company was still a defendant to the suit; that his death was suggested and brought to the attention of the court. To this plea plaintiff demurred, his demurrer was overruled, and he electing to abide by his demurrer, the suit was dismissed, and he appealed.

The cause of action under the Campbell Act survives against the personal representative of the person whose wrongful act causes the death. *Devine v. Healy*, 241 Ill. 34.

The only question we deem it necessary to consider is whether the plaintiff had the right to proceed in the same suit against any one except the surviving defendant. Section 12 of the Abatement Act (J. & A. ¶ 12) provides:

“When there are several plaintiffs, petitioners or complainants or defendants in an action, proceeding or complaint, in law or equity, the cause of which survives, and any of them die before final judgment or decree, the action, proceeding or complaint shall not on that account abate, but such death may be suggested on the record and the cause proceed at the suit of the surviving plaintiff, petitioner or complainant, or against the surviving defendant, as the case may be, in all cases as if such persons had been originally sole parties to the suit.”

In this case the plaintiff attempted to proceed, not against the surviving defendant, but against the executor of the deceased defendant. Section 13 (J. & A. ¶ 13) provides that:

“If in the case mentioned in the preceding section all the plaintiffs, petitioners or complainants or all the defendants die, the cause may be prosecuted or defended by or against the heir, devisee, executor or administrator to or against whom the cause survives of

the last surviving plaintiff, petitioner, complainant or defendant, respectively, in like manner as if the survivor had been originally the only plaintiff, petitioner, complainant or defendant.”

Sections 12 and 13 of the Abatement Act (J. & A. ¶¶ 12, 13) do not attempt to provide what *causes of action* shall survive, but relate to the *right of action*, and provide by whom and against whom the suit may be prosecuted in case of the death of one of the defendants, where the cause of action survives. We think that under the statute it is clear that in a case of two defendants, the right of action, if the cause of action survives, survives against the surviving defendant, and not against the personal representative of the deceased defendant.

It follows from what has been said that in our opinion the Superior Court properly overruled the demurrer of plaintiff to the plea of the defendant executrix, and the judgment is affirmed.

Affirmed.

MR. PRESIDING JUSTICE MCSURELY dissenting: I read sections 11, 12 and 13 (J. & A. ¶¶ 11-13) as permissive, as indicated by the word “may” in each section. Upon the death of one defendant, plaintiff could, after dismissing as to the living defendant, proceed under section 11, or without dismissing continue under section 12. To construe section 12 as mandatory is to make it operate as a statute of abatement as to any defendant dying after one year from the death of plaintiff’s decedent; considered in connection with section 11, I do not think this was the intention of the Legislature. Remedial statutes are to be construed liberally.

Maud Eacutt, Appellee, v. Isaac Eacutt, Appellant.

Gen. No. 21,281. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Bill for divorce by Maud Eacutt, complainant, against Isaac Eacutt, defendant, alleging extreme and repeated cruelty and praying for divorce and alimony. The defendant was personally served, did not appear, and an order of default was entered for failure to appear July 8, 1914. July 22nd the cause was heard and a decree of divorce entered and an order that defendant pay complainant \$75 per month alimony. July 31st defendant filed his motion to vacate the decree, set aside the default of defendant and give him leave to answer. The hearing of the motion was continued, and February 15, 1915, the motion was denied, and from that order this appeal is prosecuted.

In his affidavit in support of his motion defendant stated that the decree of divorce was entered during his absence from the State. On the hearing of the motion it was admitted that at the time of the hearing of the bill for divorce, defendant was in the court house and spoke to the witnesses. The ground on which defendant asked the court to vacate the decree of divorce was that complainant had been guilty of adultery during the marriage.

CHARLES R. NAPIER and ELLIOTT R. GOLDSMITH, for appellant.

BRUNDAGE, LANDON & HOLT, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. EQUITY, § 539*—*when decree not vacated to set up in defense matter not set up in answer.* A decree will not be vacated to permit defendant to set up a defense to the bill in a matter not set up by answer.

2. EQUITY, § 539*—*when decree not vacated on ground of newly-discovered evidence.* Where the affidavits filed in support of a motion to vacate a decree on the ground of newly-discovered evidence fail to show that the defendant could not have discovered the testimony in time for the hearing by the use of reasonable diligence, the motion is properly denied.

Lottie E. Fish, Appellee, v. William H. Fish,
Appellant.

Gen. No. 21,295. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Appeal by the defendant, William H. Fish, from a decretal order entered November 21, 1914, adjudging him guilty of contempt in failing to pay to complainant \$228, the amount of alimony decreed to her July 10, 1910, at the rate of \$12 per month from March, 1913. By a former order entered October 10, 1913, defendant was adjudged guilty of contempt in failing to pay the alimony decreed to complainant up to and including March, 1913. From that order he prosecuted a writ

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of error to the Appellate Court and the order was affirmed October 5, 1915. See *Fish v. Fish*, 194 Ill. App. 521.

WILLIAM H. FISH, *pro se*, and E. M. SEYMOUR, for appellant.

FRED A. BANGS, for appellee; RICHARD H. COLBY, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 648*—*when judgment not merged in bond.* A judgment adjudging one guilty of contempt in failing to pay alimony decreed to complainant is not merged in the bond filed thereunder, nor is the debt thereby satisfied.

2. APPEAL AND ERROR, § 709*—*when issue of writ of error does not stop further proceeding.* The fact that a writ of error has been issued in a proceeding to adjudge defendant guilty of contempt in failing to pay alimony, and has been made a supersedeas, does not prevent complainant from further proceeding to collect subsequently accruing instalments of alimony.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**In re Estate of Joseph Gorlewicz, Deceased.
On Appeal of Mary Gorlewicz, Appellant, v. Henry A.
Fowler, Administrator, Appellee.**

Gen. No. 21,318. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded with directions. Opinion filed January 3, 1916.

Statement of the Case.

Proceeding by Henry A. Fowler, administrator of the estate of Joseph Gorlewicz, deceased, against Mary Gorlewicz.

The Probate Court entered a rule on defendant, Mary Gorlewicz, to show cause why she had not complied with an order of that court directing her to turn over to the administrator of the estate of Joseph Gorlewicz certain personal property and a saloon license, or \$2,000 received on a sale of the same. On the hearing a rule was entered directing her to pay over to the administrator \$2,000. From such order she appealed to the Circuit Court. On the hearing in that court the following order was entered following certain findings:

“Therefore, it is considered by the court that the appellant, Mary Gorlewicz, take nothing by her afore-said action, and that the administrator of the estate of Joseph Gorlewicz go hence without day and do have and recover of and from the appellant, Mary Gorlewicz, the sum of two thousand dollars, together with his costs and charges in this behalf expended and have execution therefor.”

The evidence showed that Joseph Gorlewicz died May 4, 1911, and had at the time of his death a dramshop license which expired October 31, 1911. The appellant carried on the dramshop after his death, and

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October 27, 1911, made application for a dramshop license for six months beginning November 1st, and one was issued to her by the City of Chicago. February 13, 1912, she sold the license so issued to her for \$2,000.

P. E. O'NEIL, for appellant.

No appearance for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

EXECUTORS AND ADMINISTRATORS, § 62*—*when evidence insufficient to show that property constitutes asset of estate.* In a proceeding to compel one to turn over to the administrator of an estate certain personal property and a saloon license, or the price received by sale of the license, as property of the estate, evidence examined and held insufficient to show that the license in question was not the property of defendant.

Frank H. Jones, Trustee, Appellant, v. Louis W. Parker et al., Appellees.

Gen. No. 21,328. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Action for deceit by Frank H. Jones, trustee in bankruptcy of the estate of Benezette Williams, and Charles MacRitchie, copartners as Williams & Mac-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ritchie, plaintiff, against Louis W. Parker and Livingston Dickason, surviving partners of the firm of Dorwin & Company (composed of defendants and W. E. Dorwin), defendants.

From a judgment of *nil capiat*, entered on a directed verdict, plaintiff appeals.

The following facts appear: A certain railroad company was engaged in constructing a railroad over the Atchafalaya River in Louisiana. On each side of the river was a swamp through which an embankment three or four miles long had to be constructed to elevate the tracks. This embankment on the west side of the river extended from the high ground at engineer's station 829 to the west bank of the river, engineer's station 1054. The embankment on the east side extended from station 1059 at the east bank of the river east to station 1707, where it reached the high ground. October 9, 1907, Dorwin & Company, entered into a contract in writing with the railroad company with reference to the construction of the embankments. It provided that Dorwin & Company, should, at the price of thirty cents per cubic yard, complete the work on the west side of the river in one hundred and twenty days, and contained the following provision as to the work on the east side of the river:

"It is also understood and agreed that the company may, at its option, extend this contract at the same prices and on the same terms and conditions, except as to time, to cover the filling in of the temporary trestles from the Atchafalaya River (station 1059) to the east edge of the Atchafalaya swamp (station 1707). The right is reserved to the company, however, to seek bids for said work, and in event the said bids so received shall be more favorable than the prices in this contract, then and in that case the contractor herein shall have the preference on the work between station 1059 and station 1707 at the prices and terms thus obtained."

Trestles had been constructed west of the river be-

fore October 9, 1907, but no bridge over the river had been built and little or no trestle work had been built east of the river. It was originally intended to build the entire embankment by filling from trestles. The contract of October 9th provided for the filling in of the temporary trestles between stations 829 and 1054, and it appears from the provisions of the contract in relation to the work on the east side of the river, above quoted, that it contemplated the construction of the embankment on that side of the river by filling in from trestles from the river to the east edge of the swamp.

The declaration alleged that in four particulars Dorwin & Company misled Williams and MacRitchie: First, that Dorwin & Company represented that their contract with the railroad company covered the work on both sides of the river, whatever engineering method might be employed; second, that Dorwin & Company represented that the rate of progress in the construction contract had been waived; third, that Dorwin & Company represented that the plant in operation on the work was of sufficient capacity to meet the requirements of the contract; and, fourth, that Dorwin and Company represented that the equipment in use by them was in good condition and repair and suitable for the purposes intended. When the formal contract between Williams and MacRitchie and Dorwin & Company was signed by Williams, he was fully advised that the railroad company would insist on the rate of progress called for by the contract.

There was no evidence that any representations were made by Dorwin & Company as to the sufficiency of the equipment or of the plant. It appeared from the evidence that Williams and his firm were fully informed as to the sufficiency of the equipment and the plant when they entered into the contract with Dorwin & Company.

The point relied on by plaintiff is the alleged mis-

representations by Dorwin & Company to Williams and MacRitchie as to the contract with the railroad company. The railroad company was about to construct a railroad across the Atchafalaya River and the adjoining swamp on either side. It had constructed a trestle across the swamp on the west side of the river and entered into a definite contract involving a large outlay of money for an early completion of the work west of the river. Dorwin & Company had a contract with the railroad company which gave them control of the east side work at a definite price if there was no lower bidder; if there was, they would be compelled to meet that bid to secure the work. They were willing to take that risk and fix a price with Williams and MacRitchie, whatever the price with the railroad company might be, and Williams testified that they offered him the entire work at twenty-five cents a yard. Later, by reason of a suggestion by Williams, the railroad company's engineers were led to consider a plan for doing the east side work by dredging. This was the only plan Williams would consider for the east side work; and he testified that he was assured by Dorwin and by Parker that if the dredging plan was accepted, Dorwin & Company would still control the east side work.

The contention of plaintiff appeared to be that Dorwin & Company's contract with the railroad company did not include the east side work; that they represented to Williams and MacRitchie that it did, and that this was a material misrepresentation as to a material particular, whereby Williams and MacRitchie were misled and induced to alter their position to their disadvantage.

The offices of the railroad company were in New York, and Coleman was the consulting engineer and Cushing his superior, and they had their offices in New Orleans. They could only recommend but could not make a contract without the authority of the of-

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ficials in New York. This was known to Williams. In February, 1908, Williams and Dorwin went to the river to see the construction of the embankment in progress on the west side of the river, and then went to Chicago by way of New Orleans. After long consultation with Williams, Dorwin submitted to Coleman a proposition for the work on the east side of the river based on the dredging plan at forty-two cents a yard. Coleman said that he would recommend the change to dredging and the acceptance of the proposition. Williams knew that the proposition to do the work on the east side by dredging had not been accepted by the railroad company. His son Carl wrote him February 28th that Dorwin had not got anything out of Cushing except that he was favorable, that the matter had to go to Harriman for decision. Williams testified that Dorwin told him March 3rd, that "they" had decided to do the work by dredging, but "they" were not ready to enter on it, had not got the authority to do it: and further testified as follows:

"Q. Did he say the price had been agreed upon? A. No, sir, he did not. He said it had not been agreed upon.

"Q. Did he say the time for the work had been agreed upon? A. No; that was an element that was left open.

"Q. Both the dredging and the price was left open? A. The time for dredging it.

"Q. And the price? A. And the price.

"Q. So that you understood from his conversation that it remained to make a contract with the railroad company the east side work, did you? A. Yes, sir.

"Q. And you understood that on March 3rd? A. Yes.

"Q. And you understood that throughout the negotiations? A. Yes, sir.

"Q. That the railroad company and Dorwin & Company never at any time had any contract complete in terms covering the work east of the river? A. Yes, I understood it that way."

March 14, 1908, Williams made to Dorwin & Company, a written proposition for the work on the west side of the river, by which he agreed to complete the work Dorwin & Company had begun on that side of the work, and that he would have a formal contract prepared as soon as he ascertained whether the work was to be done by Williams and MacRitchie or by Williams himself and others. This proposition was accepted by Dorwin & Company. On the same day Williams submitted a proposition for the work on the east side of the river in which is the following statement:

“Referring to your proposition which you submitted to Morgan’s Louisiana & Texas Railroad & Steamship Company for making the embankment for said railroad between stations 1059 and 1656 on the Baton Rouge Branch in the swamp east of the Atchafalaya River, I submit to you the following proposition: In case your proposition is accepted by said railroad company, I will do the work for you for 33 cents per cubic yard measured in embankment; payments to be made to me as and when received by you from the said railroad company. I will have a formal contract covering the foregoing and containing provisions similar to those contained in your contract with the railroad company entered into either by the firm of Williams & MacRitchie or by myself and others as soon as I can determine whether said contract will be undertaken by said firm or by myself and others.”

The formal contract for the work on the west side of the river was signed June 2nd and bears date April 1st and contains the following provision:

“The parties of the second part” (Williams and MacRitchie) “hereby agree to complete the work required by said contract beginning on this date, in accordance with said specifications Exhibit ‘A’ except as to the time within which said contract shall be completed, and with respect thereto said parties of the second part agree to complete the balance of the work required by said contract at the same rate required

by said specifications, to-wit: about 2400 cubic yards on each working day hereafter."

The specifications Exhibit "A" are for the work on the west side of the river only. They provide that the "work shall be begun within 30 days after notification by the engineer, and shall be completed, between points covered by the contract, within 120 working days thereafter; that the quantities are approximately as follows: Station 829, Atchafalaya River, 287,434 cubic yards. The formal contract for the work east of the river which Williams refused to sign, contains the following:

"Whereas the said parties of the first part (Dorwin & Co.) have submitted to said railroad company a proposition for making the embankment for said railroad between stations 1059 and 1655 with a dredge, thus avoiding the necessity for the construction of temporary trestles at a price of 42 cents per cubic yard measured in embankments, which said proposition said railroad company now has under consideration; and whereas the parties of the second part (Williams and MacRitchie) desire to do the work of filling in the temporary trestles or constructing the embankment, as the case may be; Now, Therefore, it is hereby agreed by and between the said parties as follows: In case the proposition of the parties of the first part for constructing the embankment is accepted by said railroad company, the parties of the second part shall do the work," etc.

Williams testified that Dorwin may have shown him the specifications in January; that "at any rate if he did not show me the specifications he gave me a full synopsis of them as to the rates of progress, etc., so that before March 14th, I understood that the work on these specifications and the rate of progress was to be 2400 yards a day."

Williams further testified as follows:

"Q. On March 14, when you signed the two proposals which were in evidence, did you believe that

the railroad company had accepted the proposition of Dorwin & Company to do the work east of the river by dredging? A. Not for forty-two cents, no, sir; I understood that they had not accepted that.

“Q. You understood they had not accepted the proposition? A. Had not accepted it.

“Q. Did you not believe at any time during the entire history of these negotiations that the railroad company had accepted Dorwin & Company’s proposal to do the work east of the river by dredging? A. I never did.

“Q. You never believed it? A. I never did.

“Q. You never believed it? A. I never understood it that they had.”

Williams testified that Dorwin told him February 29th that the railroad company had decided to do the work east of the river by the dredging principle. “He did not say the price had been agreed on. If I remember, he did not mention whom it had been accepted by.”

The declaration alleged that Williams and MacRitchie would not have undertaken the work on the west side of the river for twenty-five cents per cubic yard had they not believed the alleged representations of the defendants that they had a valid and binding contract for the entire work on the west and east sides of the river, comprising approximately 900,000 cubic yards.

G. E. M. PRATT and JOHN S. MILLER, for appellant.

GEORGE G. KING, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. FRAUD, § 19*—*when representation of intention not fraud in law.* The rule that a false representation as to a matter of intention not amounting to a matter of fact is not fraud in law, even

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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though the transaction is influenced thereby, applies to the representation of an intention by a third party as well as to a representation of defendant's intention.

2. FRAUD, § 5*—*when knowledge of falsity of representation essential.* In an action for deceit, the evidence must show that the representation alleged to be false was in fact false; if false, that it was known to be false by the person making it.

3. FRAUD, § 115*—*when evidence insufficient to show actionable misrepresentation.* In an action of deceit against the surviving partners of a firm, evidence examined and held insufficient to show actionable misrepresentation by the firm relied on by plaintiffs, which was the inducing cause of the loss sustained.

Mary Bernd, Appellee, v. City of Chicago, Appellant.

Gen. No. 21,344. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the March term, 1915. Reversed with finding of fact. Opinion filed January 3, 1916.

Statement of the Case.

Action by Mary Bernd, plaintiff, against the City of Chicago, defendant, for personal injuries. From a judgment of \$1,875, for plaintiff, defendant appeals.

The evidence showed that plaintiff and her son were walking north on Sheffield avenue, plaintiff on the left or west side of her son, when she suddenly fell. The only witnesses who had any personal knowledge of the accident were plaintiff and her son, then about sixteen years old. She was asked where she walked, and answered: "I can't tell, was it really on the sidewalk or next to the sidewalk—it was on the sidewalk I fell because it was like the sidewalk, just as straight

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

as the sidewalk, as even." She further testified in answer to the question of her own counsel: "Q. Which part of the sidewalk were you walking on? A. On the outside, the outer edge." She further testified that her foot caught against something and she fell; that she did not know what her foot caught against. Her son testified that he was walking on the east side of his mother; that there were some people west of her; that he was on the sidewalk and so far as he knew his mother was on the sidewalk; that he noticed that there was a pipe or brick or something protruding from the ground; that he went back two days later and saw a mushroom pipe west of the sidewalk; that plaintiff fell in front of number 2249 Sheffield avenue; that there was snow here and there and a little ice on the street here and there. He further testified that number 2249 was a double house. The evidence showed no defect in the sidewalk, and that west of and near the sidewalk was an iron pipe, a mushroom-shaped pipe or cover, intended for use as a shut-off box for water pipes leading to the adjoining house.

The first count of the declaration alleged that plaintiff fell as she was walking on the sidewalk because of its dangerous condition. The second, that plaintiff was passing upon said sidewalk and fell because of the dangerous condition of the sidewalk and space used by pedestrians. The third, that the defendant had negligently used and permitted a certain public street, viz., Sheffield avenue, to be out of repair with dangerous pieces of iron pipe extending six inches above the ground, and that as plaintiff was passing along and upon said sidewalk and space she fell because of such dangerous condition of the sidewalk and street and the space between. The fourth count alleged that defendant had negligently kept a certain sidewalk and space in a dangerous condition with pipes extending to a dangerous height and with a dangerous depression, and while plaintiff was passing along and upon

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said sidewalk, street and space, she struck against said pipe and obstruction and into said depression and fell, etc.

JOHN W. BECKWITH, N. L. PIOTROWSKI and DAVID R. LEVY, for appellant.

OSCAR C. MILLER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL CORPORATIONS, § 1098*—*when evidence insufficient to show injuries caused pedestrian by negligence of city.* In an action against a city to recover for personal injuries alleged to have been caused by a defect in the sidewalk, negligently permitted to be there by defendant city, evidence examined and held insufficient to show that the plaintiff's injuries were caused by defendant's negligence.

In re Estate of Charles Spohr, Deceased.
On Appeal of Julia E. Spohr, Appellant, v. Adolph L.
Kraus, Executor, Appellee.

Gen. No. 21,373.

1. HUSBAND AND WIFE, § 223*—*when recital in decree not part of contract.* The recital in a decree for separate maintenance that the wife is thereby barred of dower does not constitute such recital a part of a contract entered into between the husband and wife before the entry of such decree for the conveyance of certain property to the wife.

2. HUSBAND AND WIFE, § 255*—*what extent of jurisdiction to decree separate maintenance.* A court of chancery has no power to decree separate maintenance independently of the authority conferred by statute.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Spohr v. Kraus, 197 Ill. App. 348.

3. DOWER, § 62*—*when decree for separate maintenance cannot bar right.* A court of chancery granting a decree for separate maintenance has no power to incorporate therein a provision barring the wife's right of dower.

Appeal from the Circuit Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed January 3, 1916.

WILLIAM A. CONOVER, for appellant.

GEORGE A. MILLER, for appellee; OSCAR HEBEL, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

The question presented by this record is whether the appellant, Julia E. Spohr, is entitled to a widow's award as the widow of her deceased husband, Charles Spohr. The parties were married in 1857, and Charles Spohr was a resident of Cook county at the time of his death in 1912. He died testate but made no provision for his widow in his will. He left personal estate amounting to \$3,000 and also real estate.

The Probate Court dismissed appellant's petition for the allowance and appraisement of a widow's award. On appeal by her to the Circuit Court that court gave judgment that "appellant take nothing by her aforesaid action and that the Estate go hence without day" and for costs. The facts which the Circuit Court held barred the widow from claiming a widow's award are that she in 1888 in the Superior Court filed a bill for separate maintenance; that after the filing of the bill her husband conveyed to her a life estate in property 128-30 Siegel street; that June 27, 1888, the parties entered into a written contract reciting the making of said conveyance, and that by a decree to be entered in said cause for separate maintenance it is provided that Julia E. Spohr is to be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

forever barred of all "right, title, claim or interest, whether of homestead, dower or otherwise, in and to all the other property of Charles Spohr"; that June 29, 1888, a decree was entered in said separate maintenance suit; this decree recites the conveyance to Mrs. Spohr of the Siegel street property and further recites that the same is accepted by Mrs. Spohr "in lieu of all her dower and right of dower, homestead rights, or other claims in or to all other property whereof the defendant is now or may hereafter be seized," and decrees *inter alia* "that the complainant is not entitled to and she is hereby forever barred of all right, title, interest or dower or right of homestead or claim of any nature in the other property whereof the said defendant is now seized and in any property whereof the defendant may hereafter become seized; and the said defendant shall hold, possess and enjoy such other property with the full power to incumber and dispose thereof to all intents and purposes as if he were sole and unmarried." Mrs. Spohr lived on the property so conveyed to her until 1905, when the City of Chicago took possession thereof for school purposes. Her life estate in the property was sold in 1897 on an execution issued on a judgment against her, and the purchaser in 1904 conveyed the same to Catherine Spohr, the daughter of Julia E. Spohr. The city condemned the property and paid the compensation awarded, \$6,750, to the county treasurer, for the benefit of the parties interested in the premises, and the Superior Court, by a decree, required the county treasurer to pay said money to the State Bank of Chicago to be invested in interest bearing securities and to pay the income to Catherine Spohr during the lifetime of Mrs. Spohr, upon whose death the principal was to be divided among the four heirs. No minor child of the deceased was living with Mrs. Spohr at the time of her husband's death.

It will be noticed that there was no contract between

the parties providing that the conveyance of the life estate in the Siegel street property accepted by Mrs. Spohr was in lieu of dower, homestead rights or other claims in the property of which her husband was or might thereafter be seized; but the decree recites that there was such an agreement and declares that she was "hereby"—that is in and by the decree—forever "barred of all right, title, interest or dower or right of homestead or claim of any nature" in her husband's property. This recital in the decree did not make the provision so recited a part of the contract.

The only question presented by this appeal is whether the decree for separate maintenance is a bar to the claim of Mrs. Spohr to a widow's award in the estate of her deceased husband. If the Superior Court had power to make that part of the decree above quoted, Mrs. Spohr is barred, but if not, her right to an award is unaffected by it. A Court of Chancery has no power to grant divorces or to decree separate maintenance independent of the statutes on that subject. In England the ecclesiastical courts had exclusive jurisdiction to grant divorces *a mensa et thoro* and Parliament alone had the power to dissolve the marriage contract absolutely. We must have recourse to the statutes, then, for the power exercised by the Superior Court, if it exists. The provision in relation to separate maintenance is section 1 of the act in relation to married women of 1877, Hurd's Statutes, Ed. 1913, p. 1364 (J. & A. ¶ 6159), which provides: "That married women, who, without their fault, now live or hereafter may live, separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands in the Circuit Court of the county where the husband resides, for a reasonable support and maintenance, while they so live or have so lived separate and apart." It will be seen, first, that a separation, a living

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apart from her husband, is not necessarily a complete and final separation of the parties; the allowance is to the wife while they live separate and apart and a reconciliation is contemplated. And, second, that the allowance directed to be paid is not a final disposition of the property of the husband between himself and wife, but is, on the contrary, a temporary provision for her support elsewhere than in her husband's home until they are reconciled. The statute does not in terms authorize the court to make any decree affecting the right to a widow's award. The parties did not in this case, as in *Kroell v. Kroell*, 219 Ill. 105, jointly contract that each released all interest in the property of the other, renouncing all claims in law or equity of curtesy, dower, homestead, survivorship or otherwise, and the contract cannot therefore be said to release or bar the widow's award. It would be wholly inconsistent with the provisions and policy of the statute to authorize a decree which would determine the rights of a wife in the estate of her husband by giving a share of it in lieu of her dower, distributive share, and widow's award. We find no precedent or authority for any such decree. *Crain v. Cavana*, 36 Barb. (N. Y.) 410; *Crain v. Cavana*, 62 Barb. (N. Y.) 109; *Hakamp v. Hageman*, 36 Md. 511.

We hold that by the contract in question appellant did not release her right to her widow's award, and that a decree for separate maintenance does not bar her of her right to her widow's award; and that the Probate Court was in error in dismissing her petition for the allowance and appraisement of a widow's award, and the Circuit Court was in error in rendering a judgment of *nil capiat* against her.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

**E. F. Keebler, trading as E. F. Keebler & Company,
Appellant, v. John F. Devine, Administrator, Ap-
pellee.**

Gen. No. 21,384. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Action by E. F. Keebler, trading as E. F. Keebler & Company, plaintiff, against John F. Devine, administrator, etc., of the estate of Lucy F. Alexander, deceased, defendant, to recover commissions alleged to be due for negotiations in regard to the lease and sale of certain property. The action was originally instituted against Lucy F. Alexander, who died pending the action. To reverse a judgment of *nil capiat*, plaintiff appeals.

The evidence shows that plaintiff was a real estate broker in Chicago, and Mrs. Alexander resided in Kentucky. Before 1907 plaintiff had negotiated leases for David Mayer of Chicago and been paid commissions therefor by him, and J. Alexander Waller had acted as agent for Mrs. Alexander in relation to the demised premises, but had no authority from her to lease the same. May 31, 1907, plaintiff wrote Mrs. Alexander a letter which related to the leasing of the real estate in question. Gilbert F. Keebler, the son and an employee of plaintiff, testified that plaintiff wrote to Mrs. Alexander at the suggestion of Waller, but Waller denied that he made any such suggestion. In the letter of June 3rd, Mrs. Alexander stated the terms on which she was willing to lease the real estate for thirty or ninety-nine years. One of the conditions stated was that the tenant "should give a bond to

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guarantee the lease." The rentals named by Mrs. Alexander in her letter of June 3rd were, for a thirty-year lease from \$20,000 to \$28,000 per year and \$15,000 cash for the buildings then on the premises; and for a ninety-nine year lease, \$20,000 to \$25,000 per year and \$15,000 cash for the buildings. A few days later Gilbert F. Keebler went to the residence of Mrs. Alexander in Kentucky, showed her a copy of her letter of June 3rd and told her that he had a proposition to submit to her for the lease of the property. Keebler was sent to Mrs. Alexander by David Mayer, who paid the expenses of his trip there, but this fact Keebler concealed from Mrs. Alexander and did not disclose the name of the person or corporation who proposed to lease the property, but told her that the individual back of the proposition did not want the name known, and for that reason the Western Trust & Savings Bank would guaranty that his proposition was bona fide. She asked him what his commission would be, and he told her. He remained at her residence a week and communicated with David Mayer by long distance telephone every day. A week after his return to Chicago, Dr. Alexander, the son of Mrs. Alexander, came to Chicago, and Gilbert Keebler and David Mayer met him at Mr. Loesch's office on July 12th. There was some conflict in the testimony as to what was said at this meeting, but there was evidence to the effect that the Co-operative Mercantile Company, a corporation with a capital of \$5,000, was mentioned as the proposed lessee; that Alexander said the proposed lessee was not satisfactory, that they would have to give further security; that the Alexanders wanted \$100,000 security put up or the Western Trust & Savings Bank in the lease, or its equivalent; that Mayer said: "I hold my commissions sacred to me, but I cannot ask my client to agree to any such terms," and that Alexander then said: "Mr. Mayer, if that is the case, the deal is off."

Dr. Alexander wrote plaintiff July 1st, stating that they knew nothing about the corporation; that when the younger Keebler was in Kentucky he emphasized the point that the Western Trust & Savings Bank would be a party to the lease and add greatly to its security. In the letter the terms which Mrs. Alexander demanded were stated. One was that the Western Trust & Savings Bank would be a party to the lease, or a substantial increase in the security by bond or equivalent. From July 12th no communication of any kind passed between the Keeblers or either of them and the Alexanders or either of them until after January 23, 1908, at which time the property was leased by Mrs. Alexander to David Mayer for twenty years.

FELSENTHAL & WILSON, for appellant.

H. J. TONER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 98***—*when evidence sufficient to show acting for both parties.* In an action against the lessor to recover commissions for negotiating the lease, evidence examined and held to show that plaintiff was acting as agent of the lessee in the transaction.

2. **BROKERS, § 62***—*when commissions not recoverable where broker acts for both parties.* A broker who attempts to act for both parties without disclosing the fact to his principals is precluded from recovering commissions for his services.

3. **BROKERS, § 62***—*when commissions not recoverable where broker acts for both parties.* In an action against the lessor of property to recover commissions for negotiating the lease, where the evidence shows that plaintiff permitted his son and employee to receive from the lessee the expenses of a trip to the home of the lessor in another State to negotiate the lease, plaintiff cannot recover.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stedman v. Chicago Musical College, 197 Ill. App. 356.

4. BROKERS, § 90*—*when evidence insufficient to show procuring cause of lease.* In an action by a real estate broker against a lessor to recover commissions, evidence examined and held to support a finding that plaintiff was not the procuring cause of the lease.

Marshall Stedman, Appellee, v. Chicago Musical College, Appellant.

Gen. No. 21,414. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Action by Marshall Stedman, plaintiff, against Chicago Musical College, a corporation, defendant. From a judgment for plaintiff for \$5,831.50, defendant appeals.

Error charged by defendant was the action of the trial court in permitting plaintiff to file an amended declaration and an amended affidavit of claim after defendant had filed a plea of the general issue and after the same were filed striking out defendant's plea, ordering that the default of defendant be entered and entering judgment against it for \$5,831.50. The order giving plaintiff leave to file an amended declaration and an amended affidavit of claim was entered November 2, 1914. The amended declaration and amended affidavit of claim were filed the same day. The order provided that defendant's "plea now on file shall stand to said amended declaration, to which latter plaintiff objects and excepts." November 25th defendant's plea was stricken out, its default taken and judgment entered against defendant. The bill of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

exceptions showed that defendant by its counsel objected to plaintiff's motion for leave to amend, but its objection was overruled and defendant excepted; that defendant also excepted to the judgment and prayed an appeal, which was allowed on defendant filing a bond, etc. The record showed no motion of defendant for leave to file an affidavit of merits.

J. E. INGRAM, for appellant; HERMAN FRANK and G. W. KILLELEA, of counsel.

JOHN A. McKEOWN, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 248*—*when allowance of amendment in power of court.* The court may permit plaintiff, over defendant's objection, to file an amended declaration and amended affidavit of claim after defendant has filed a plea of the general issue.

2. JUDGMENT, § 106*—*when entry of default proper.* Where plaintiff, by leave of court, files an amended declaration and amended affidavit of merits and defendant's plea is stricken and no amended affidavit of merits is filed, judgment by default is properly entered for plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Brod, 197 Ill. App. 358.

**The People of the State of Illinois for use of the
State Board of Health, Defendant in Error, v.
John Brod, Sr., Plaintiff in Error.**

Gen. No. 21,478. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 13, 1916.

Statement of the Case.

Action of debt by the People of the State of Illinois for the use of the State Board of Health against John Brod, Sr., to recover the penalty for practicing medicine without a license from the State Board of Health, imposed by section 9 of the Act entitled "An Act to Regulate the Practice of Medicine in the State of Illinois and to Repeal an Act therein named," in force July 1, 1899 (Laws 1899, p. 273, J. & A. ¶ 7377.) To reverse a judgment for plaintiff, defendant prosecutes this writ of error. The statement of claim alleges a former conviction for the same offense, and because thereof claims the penalty of two hundred dollars.

The appeal was taken in the first instance to the Supreme Court and that court, holding that no constitutional question was involved, transferred the case to the Appellate Court.

Defendant contends that if the act is valid, it does not apply to him because he was practicing medicine when the act took effect:

EDWIN H. CASSELS and KENNETH B. HAWKINS, for plaintiff in error.

THOMAS S. HOGAN, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. COURTS, § 150*—*when ruling on appeal to Supreme Court law of the case in transferred cause.* Where on an appeal to the Supreme Court in the first instance in an action to recover a statutory penalty, that court holds that no constitutional question is involved and transfers the cause to the Appellate Court, such decision disposes of the question of the constitutionality of the act under which the proceeding is brought.

2. PHYSICIANS AND SURGEONS, § 5*—*when licensing act applicable to practicing physicians.* Laws 1899, p. 273 (J. & A. ¶ 7377), regulating the practice of medicine, is applicable to physicians practicing when the act took effect.

3. PENALTIES, § 16*—*when judgment imposing imprisonment until payment of penalty valid.* A judgment in an action to recover for the violation of a penal law may provide for defendant's imprisonment until the payment of the judgment and costs.

Charles F. Thurn, trading as John L. Thurn & Company, Appellee, v. Bertha C. Schwartz, Administratrix et al., Defendants.

On Appeal of Marie Bade and Bertha C. Schwartz, Administratrix, Appellants.

Gen. No. 21,274. (Not to be reported in full.)

Appeal from the Superior Court of Cook County; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. Rehearing denied January 17, 1916.

Statement of the Case.

Action by Charles F. Thurn, trading as John L. Thurn & Company, plaintiff, against Marie Bade and Bertha C. Schwartz, administratrix of the estate of Gustav Bade, deceased, defendants.

On July 23, 1910, a judgment for \$573.21 was confessed and entered against Marie Bade and Gustav

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thurn v. Schwartz, 197 Ill. App. 359.

Bade in favor of plaintiff in the Superior Court. Gustav Bade, after entry of judgment, died, and on March 20, 1914, Marie Bade, his codefendant, and Bertha C. Schwartz as administratrix of the estate of Gustav Bade, deceased, moved the Superior Court to vacate the judgment and for leave to plead. This action was allowed. A trial was had before court and jury, which resulted in a verdict finding the issues for the plaintiff. A motion for a new trial being denied, it was ordered that the judgment theretofore rendered July 13, 1910, stand in full force and effect and that plaintiff have execution upon said judgment and for costs. From such judgment, defendants appeal.

JONES, KERNER & POSVIC, for appellants; DEWITT C. JONES, of counsel.

WILLIAM SCHWEMM, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

JUDGMENT, § 80*—*when motion to vacate confessed judgment denied for laches.* A delay of four years in moving to vacate a confessed judgment is such laches as to warrant a denial of the motion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richard A. Hale, Appellant, v. Clara Hale, Appellee.**Gen. No. 21,284. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill for divorce by Richard A. Hale, complainant, against Clara Hale, defendant. From a decree dismissing his bill for want of equity, complainant appeals.

Complainant charged defendant with having committed adultery with one Clinton Vail on the 15th day of September, 1911, and on the 24th day of March, 1913, and the place of the adulterous intercourse was alleged to be the City of Chicago, and he also charged generally, but not specifically, other adulterous acts with Vail.

The answer of the defendant denied categorically the two acts of adultery specifically charged and also denied that she committed adultery at any other time or times with Vail. It is likewise charged in the bill and admitted in the answer that one child was born as the fruit of the union between the parties, a daughter, Frances Hale, who was between six and seven years of age at the time of the filing of the bill. A replication was filed to the answer and the cause was tried before the court on the pleadings thus formed.

Complainant's proof to sustain his charges of adultery were based upon the alleged confession of his wife made on the 16th day of September, 1911, and as to the adultery charged to have been committed on March 24, 1913, on the testimony of two detectives. The alleged confession defendant denied *in toto*. The evidence showed that the parties continued to live in the marital relation from that time until the middle

Hale v. Hale, 197 Ill. App. 361.

of May, 1912; that complainant did not finally leave his wife until August 7, 1912, and letters written by him to her during that time were couched in affectionate terms, without any reference to defendant's having fallen from marital rectitude.

In avoidance of these matters, complainant put in evidence a letter dated August 7, 1912, written to him by the parents of defendant, which letter was prepared by a lawyer for complainant and which reads as follows:

"I regret that circumstances make it necessary or proper, in your opinion, for you to leave our house and leave Clara with us; but, knowing as I do that you and she have not lived together as husband and wife since you made the painful discovery, and knowing, as I have hitherto informed you, from what she has told me, that you have statutory grounds for divorce, I cannot urge or expect you to stay any longer with us, if your judgment and feelings prompt you not to do so. I beg of you, however, that if you seek a divorce you will spare her feelings and ours as much as you possibly can."

Complainant also introduced a letter in evidence written by defendant to complainant's mother in October, 1911.

GEORGE C. OTTO and DELBERT A. CLITHERO, for appellant.

JOHN C. EVERETT, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 50*—*when burden of proof on complainant.* In a suit for divorce on the ground of adultery, the burden is on the complainant of proving by a preponderance of the evidence at least one charge of adultery made in the bill.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. APPEAL AND ERROR, § 1414*—*when findings of fact on bill for divorce not disturbed.* On appeal in a bill for divorce, the trial court's findings of fact will not be disturbed unless palpably and clearly contrary to the weight of the evidence.

3. EVIDENCE, § 23*—*when inferences not drawn from witness' lack of memory.* The fact that a witness failed to remember matters as to which it would seem incredible that she had no recollection does not warrant the drawing of inferences from her testimony not deducible from the facts contained therein.

4. DIVORCE, § 16*—*when evidence sufficient to show condonation.* On a bill for divorce on the ground of adultery, based on an alleged confession made on September 16, 1911, evidence that the parties continued to occupy the marital relation until the middle of May, 1912, and that complainant did not finally leave his wife until August 7, 1912, and that his letters to her during that time were in affectionate terms and contained no reference to the subject of her confession, held sufficient to show condonation.

5. DIVORCE, § 46*—*when evidence insufficient to show confession of adultery.* On a bill for divorce on the ground of adultery, evidence examined and held insufficient to show a confession of adultery.

6. DIVORCE, § 46*—*when evidence insufficient to show adultery.* On a bill for divorce on the ground of adultery, evidence of private detectives employed by complainant to shadow defendant, which shows that they followed her and the co-respondent for several weeks and saw them together at times, but only in public places and surrounded by many people, is insufficient to show adultery.

Armour & Company, Appellant, v. Industrial Board of Illinois, W. V. Conley, Secretary, and J. B. Vaughan, Peter J. Angsten and Robert Eadie, Members, Appellees.

Gen. No. 21,310.

1. WORKMEN'S COMPENSATION ACT, § 1*—*when warehouse extra-hazardous enterprise.* A warehouse used by an employer for the storing and vending of its commodities which contains an electric elevator and is located in a city which regulates by ordinance the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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use and operation of elevators, is an extra-hazardous enterprise within the meaning of Laws 1913, sec. 3.

2. WORKMEN'S COMPENSATION ACT, § 1—*when liberally construed.* The Workmen's Compensation Act of 1913, though in derogation of common law is beneficent and therefore, to be liberally construed to carry out its objects.

3. WORKMEN'S COMPENSATION ACT, § 1*—*when provision abrogating common-law defenses valid.* The provision of the Workmen's Compensation Act of 1913 abrogating the three common-law defenses is valid.

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

A. R. URION and W. C. KIRK, for appellant.

ACTON & ACTON, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This appeal brings before us for review the action of the Circuit Court in quashing a writ of certiorari sued out by appellant against appellees and dismissing its petition.

This litigation arises under the Workmen's Compensation Act.

The proceeding before the Industrial Board discloses that one Grover C. Richardson was employed by appellant as a general laborer in a warehouse building of appellant in the City of Danville in this State, the warehouse being used for the storing and vending of the commodities of appellant. In that building was an electric elevator, about which Richardson worked and at times operated. On October 27, 1913, while Richardson was operating the elevator, he was caught between the elevator platform and the second floor of the building, and killed.

An appropriate proceeding was commenced before the Industrial Board to recover from appellant com-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pensation for the accidental death of Richardson in pursuance of the provisions of the Workmen's Compensation Act. This proceeding resulted in the Industrial Board awarding the sum of \$2,912, payable at the rate of \$7 per week for 416 successive weeks. In making the award the Board made a finding to the effect that because of the operation of the elevator and the ordinance of the City of Danville imposing regulations with reference to the guarding and using or placing of machinery and appliances for the protection of appellant's employees and the public, appellant was brought under the provisions of the Workmen's Compensation Law as a "hazardous employer of labor," and further found that appellant had not expressly rejected the statute.

The facts were stipulated. Among these facts are the following:

That deceased was killed in the course of his employment; that at that time deceased was paid as wages \$14 per week; that Armour & Company were operating in Danville what is known as a distributing house, where meats are stored and distributed; that this building, in which Richardson was killed, consisted of a basement and three stories above ground; that in this building in connection with the business of appellant it operated and used a freight elevator; that such elevator was operated by electric power, controlled by ropes from any story of the building; that at and before the time of the accident there was in force in the City of Danville an ordinance regulating and safeguarding elevators in buildings of the height of the one in which deceased was killed.

The stipulation also admitted that appellant had not given any notice either of its election to come under the provisions of the act or rejection of its provisions. The Board found that because of the Danville ordinance regulating freight and passenger eleva-

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tors and the further fact that appellant had not given notice rejecting the Workmen's Compensation Act, it came under its provisions by operation of law, as a hazardous employer of labor, and the Board in its opinion says:

"The Board is of the opinion that the facts set up in the stipulation as above stated bring the respondent under the provisions of the act as a hazardous employer of labor. There can be no question but what the business of the respondent can be denominated as an enterprise, and that there was an ordinance of the City of Danville imposing regulations with reference to the guarding and using or placing of machinery and appliances for the protection of employees and the public. This being true, the respondent here is a hazardous employer of labor; and in order to escape liability for compensation to employees under the provisions of the Workmen's Compensation Act, must give the notice required for the rejection of the provisions of the act as a hazardous employer of labor; and not having given it, there can be no question but what they were and are now operating under the provisions of the act."

We are in accord with the Board's opinion as thus expressed.

Appellant, in its petition for a writ of certiorari to the Circuit Court, avers that it sued out a writ of certiorari to the Supreme Court to review the award of the Industrial Board, and that on October 9, 1914, the Supreme Court dismissed the petition for want of jurisdiction, holding that that portion of the Workmen's Compensation Law which sought to give the Supreme Court original jurisdiction in certiorari to review the decision of the Industrial Board was invalid as being in conflict with section 2, article VI, of the Constitution of Illinois, and holding that the Circuit Courts had jurisdiction to issue common-law writs of certiorari to said Industrial Board. This decision is authority for the Circuit Court's granting the certiorari prayed for in the petition.

The solution of the questions involved rests in the construction of those parts of the Workmen's Compensation Act applicable to the questions raised upon the petition for certiorari. Item 8 of section 3 of the Act of 1913 reads:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous."

Section 4 of the Act of 1910 (J. & A. ¶ 5389), regulates, among other things, the operation of elevators and requires certain safety appliances to be used in their operation, etc.

Section 2 of the Act of 1913 provides that every employer should be conclusively presumed to have filed notice of election as provided in section 1, paragraph a, and to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the Industrial Board, etc.

Paragraph b, of section 3, enumerates enterprises or businesses which are extra-hazardous within the meaning of the act. Among the enterprises or businesses enumerated by Item 4 of paragraph b, of section 3 as extra-hazardous is the operation of "any warehouse."

Section 631 of the general ordinance of the City of Danville, in force at and prior to the time of the death of deceased, is an ordinance regulating the use and operation of elevators in the City of Danville.

We do not agree with appellant's contention that the reference to the "operation of any warehouse" in the act must be construed to refer only to public warehouses. Warehouses of the character of appellant's come within the act. It is a warehouse, used as such, for the purposes of appellant's business, and we think

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this holding is sustained by the decisions of the courts of this country and of England.

The warehouse of appellant in which Richardson met his death comes within section 8 above referred to, for we find that the warehouse is an enterprise regulated by both statutory and municipal ordinances. This vested the Industrial Board with jurisdiction, and therefore the judgment of the Circuit Court in its disposition of the writ of certiorari was without error.

Appellant, confessedly not having filed notice that it had elected not to be bound by the act, is within its terms and amenable to its provisions. Appellant argues, however, that the statute in controversy being in derogation of the common law, should be strictly construed. This is a well-recognized canon of construction, but it has its exceptions. When a legislative act is beneficent in its provisions and intended to provide a way of escape from the rigors of the common law, then such an act should receive in construction by the courts a sufficiently broad and liberal interpretation to cause it to so operate as to attain the beneficent object for which it was enacted, unless such an interpretation would violate some constitutional right.

The Legislature, by the Workmen's Compensation Act, adopted a new policy governing the relations between master and servant for the very purpose of enabling the servant to escape the barriers erected by the common law which prevent recovery of compensation in certain cases. The statute, *supra*, was passed to thereafter render abortive such defenses.

That the statute is in derogation of the common law is patent. That was the intention of the Legislature, and it offends no constitutional right, because there is no such thing as a vested right in the common law. Whatever of the common law is in force in this State exists in virtue of statutory provisions. By this statute the common-law doctrine of contributory negligence, assumed risk and fellow-servant is abolished.

Murphy v. Gunning System, 197 Ill. App. 369.

These three common-law defenses are by the statute made unavailable. Appellant insists that depriving it of these defenses is an infringement of its right and contrary to law; but in *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401, and *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 1 N. C. C. A. 875, the right of the Legislature to deprive the employer of all common-law defenses is sanctioned and upheld. Unless the employer refuses to accept the terms of the act, he is, in the language of the statute, "conclusively presumed to have filed notice of election and to have elected to provide and pay compensation according to its provisions." This is the position of the appellant, and thereby his liability is fixed.

We therefore find that the Industrial Board had jurisdiction of the case of Richardson and that the Circuit Court did not err in quashing the writ of certiorari and in dismissing appellant's petition, and its judgment is therefore affirmed.

Affirmed.

**Owen Murphy, Appellee, v. Gunning System,
Appellant.**

Gen. No. 21,325. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLINTON F. LAWIN, Judge, presiding. Heard in this court at the June term, 1915. Reversed and remanded. Opinion filed January 3, 1916.

Statement of the Case.

Action on the case for personal injury by Owen Murphy, plaintiff, against Gunning System, defendant. Plaintiff recovered against the defendant in the

Murphy v. Gunning System, 197 Ill. App. 369.

Superior Court a judgment on the verdict of a jury for \$3,000, and defendant appeals.

This appeal is prosecuted from the second trial of the cause. On the first trial a verdict was instructed against plaintiff and the Appellate Court reversed the judgment entered on that verdict for the reason that in its opinion the facts found in the record should have been submitted to the jury for determination. The pleadings are the same as at the first trial. The syllabus on the former appeal appears in 184 Ill. App. 455.

DAVID K. TONE, for appellant.

GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1725*—*when refusal to eliminate count error.* In an action by an employee against an employer to recover for injuries received by falling from a framework, where on a former appeal the Appellate Court decided that plaintiff could not maintain an action for a defect in the footboard on which he was working, it is error to refuse to eliminate a count in the declaration charging as the sole act of negligence against defendant that it failed to maintain the footboard in a reasonably safe condition.

2. APPEAL AND ERROR, § 1815*—*when instructions misleading.* Instructions which permit the jury to predicate their verdict on a count of the complaint based on a theory of negligence which had been eliminated from the case on a former appeal are misleading.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Isabella Curran, Appellant, v. L. K. Cushing, Appellee.**Gen. No. 21,338. (Not to be reported in full.)**

Appeal from the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Action by Isabella Curran, plaintiff, against L. K. Cushing, defendant, upon a lease for an apartment. Under a power of attorney contained in the lease, judgment was entered for plaintiff for one month's rent and attorney's fees. On motion made by defendant and a pertinent showing of facts, he was let in to plead. From a judgment of *nil capiat*, plaintiff appeals.

EDWARD J. KELLY, for appellant.

CHARLES E. SELLECK, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 140*—*when tenant not estopped to deny premises are uninhabitable.* A tenant who has not gone into possession of premises rented for residence purposes is not estopped to deny that they were in a habitable condition at the time the term commenced because the lease contained a covenant on his part that he received possession of the demised premises in good order and condition, such covenant being untrue.

2. LANDLORD AND TENANT, § 176*—*when covenant for quiet possession and enjoyment implied.* The law implies a covenant for quiet possession and enjoyment of leased premises.

3. LANDLORD AND TENANT, § 275*—*when tenant not in possession not liable for rent.* The failure of the landlord to put leased premises in a habitable condition at the commencement of the term excuses a tenant who has not gone into possession from all the covenants of the lease including the covenant to pay rent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Davenport, v. Calumet & South Chicago Ry. Co., 197 Ill. App. 372.

Clara Davenport, Appellee, v. Calumet & South Chicago Railway Company, Appellant.

Gen. No. 21,348. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1915. Reversed with finding of fact. Opinion filed January 3, 1916. Rehearing denied January 17, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action on the case by Clara Davenport, plaintiff, against the Calumet & South Chicago Railway Company, a corporation, defendant, for damages for personal injuries sustained while attempting to alight from a moving street car. From a verdict for plaintiff for \$10,000, defendant appeals.

JOHN E. KEHOE and CHARLES LEROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

PEDEN, KAHN & MURPHY, for appellee; R. C. MERRICK, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 131*—*when negligence must be proved by preponderance of evidence.* The plaintiff, in an action on the case against a street railway company for damages for personal injuries alleged to be due to negligence in starting a car which had stopped, must sustain his case by a preponderance of the evidence.

2. STREET RAILROADS, § 131*—*when negligence in starting car not proved by preponderance of evidence.* The plaintiff, in an action against a street railway company for damages for personal injuries alleged to have been sustained as the result of negligence in start-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Schindler v. Link Belt Machinery Co., 197 Ill. App. 373.

ing the car after it had stopped and while plaintiff was trying to get off, fails to sustain his case by a preponderance of evidence where the testimony of plaintiff and another that the car stopped and started with a jerk while plaintiff was attempting to get off was directly contradicted by six witnesses for defendant who testified that plaintiff alighted while the car was in motion.

3. **APPEAL AND ERROR, § 49***—*when Appellate Court may make findings of fact.* When the Appellate Court, upon review, determines that the evidence fails to sustain the verdict, it may reverse the judgment with a finding of fact.

William Schindler, Appellant, v. Link Belt Machinery Company, Appellee.

Gen. No. 21,366. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. Rehearing denied January 17, 1916.

Statement of the Case.

Action on the case by William Schindler, plaintiff, against the Link Belt Machinery Company, defendant, for damages for an assault and battery alleged to have been committed upon plaintiff by defendant's foreman. From a judgment for defendant, plaintiff appeals.

CHARLES H. MITCHELL and H. A. BARNHARDT, for appellant.

A. C. WILD, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

MASTER AND SERVANT, § 846*—*when act of servant not within scope of employment.* The commission of an assault by a servant, who was engaged in guarding employees of the master on their way home during a strike, upon a person unconnected with and uninterested in the strike during a purely personal altercation, was an act without the scope of the employment of the servant so as not to make the master liable.

In re Estate of James Foster, Deceased. On Appeal of Walter Foster et al., Executors, Appellants, v. W. H. Hopkins, Appellee.

Gen. No. 21,376. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916.

Statement of the Case.

Action by W. H. Hopkins, plaintiff, against the estate of James Foster in the Probate Court upon four bonds given in the Municipal Court to perfect writs of error from the Appellate Court to the Municipal Court. From an allowance of the claim in the Probate Court, appeal was taken to the Circuit Court. From the judgment of the Circuit Court for plaintiff, the executors of the estate appeal.

LOUIS GREENBERG and FRED DE YOUNG, for appellants.

CLINTON A. STAFFORD and HARRY A. BARNHARDT, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. ACTION, § 43*—*when several bonds signed by testator as surety may be embodied in same claim against estate.* The obligee in several bonds given in the same court to perfect writs of error from the Appellate Court to such court, which are respectively signed by the same persons as principal and surety, may include all such bonds in one action in the Probate Court against the estate of the deceased surety.

2. APPEAL AND ERROR, § 878*—*necessity of evidence appearing in abstract.* The Appellate Court is not bound to consider the testimony of a witness which is not abstracted.

3. WITNESSES, § 141*—*when executor not incompetent to testify in action against estate.* An executor is competent to testify in an action against the estate upon bonds signed by testator as surety regarding facts occurring subsequently to the death of the testator.

4. PRINCIPAL AND SURETY, § 46*—*when surety estopped to deny judgments recited in bonds.* A surety upon bonds given to perfect writs of error is estopped to deny the judgments recited in the bonds.

5. TRIAL, § 204*—*when verdict directed for failure to establish defense.* The trial court may direct a verdict for the plaintiff where, as the result of the proper exclusion of evidence, the defendant has not established his defense.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nimmons v. Lyon & Healy, 197 Ill. App. 376.

**George C. Nimmons, Appellee, v. Lyon & Healy,
Appellant.**

Gen. No. 21,387. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by George C. Nimmons, complainant, against Lyon & Healy, a corporation, defendant, to enforce a mechanic's lien for architect's fees claimed to be due from defendant for preparing, making and drawing certain plans or preliminary sketches for a factory building. From a judgment of the chancellor confirming the report of the master, to whom the cause had been referred, and granting a lien to complainant for the amount recommended by the master, defendant appeals.

WILLIAM B. JARVIS, for appellant.

G. FRED RUSH and WALTER S. HOLDEN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1416*—*when master's finding entitled to same weight as that of jury.* The findings of fact by a master in chancery must be given the same weight by the Appellate Court as would the verdict of a jury in a suit at law.

2. MECHANICS' LIENS, § 21*—*when architect entitled to mechanic's lien.* An architect who draws plans and specifications for a building to be erected upon a designated spot performs services for the purpose of building it so as to be entitled to a mechanic's

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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lien, even though he does not superintend the construction of the building, and even though a building of the same identical character is not erected.

3. **ESTOPPEL**, § 63*—*when presentation of bill for amount less than contract price not estoppel to recover contract price.* An architect who agrees to draw plans and specifications for a building for a certain price may not be denied a lien for the contract price, upon performance of the contract, because he presented a bill for a lesser amount, where such bill was intended as a compromise and was not accepted.

Samuel Cohen, Administrator, Appellee, v. City of Chicago, Appellant.

Gen. No. 21,418.

1. **APPEAL AND ERROR**, § 219*—*when defendant cannot complain of peremptory instruction in favor of codefendant.* A defendant cannot complain of a peremptory instruction in favor of a codefendant where he did not object to the instruction when given.

2. **INSTRUCTIONS**, § 20*—*when instruction that jury should take law from court proper.* An instruction that the jury shall take the law from the court and not from counsel is proper in order to counteract the effect of misinformation concerning the law indulged in by counsel in argument.

3. **INSTRUCTIONS**, § 88*—*when instruction as to preponderance of evidence improper.* Where defendant puts in no evidence, an instruction as to the preponderance of the evidence is improper, as the jury in such case consider the case on the evidence of plaintiff.

4. **INSTRUCTIONS**, § 85*—*when instruction on evidence improper.* Where the defendant puts in no evidence, an instruction that "if the evidence is equally balanced, they must find for defendant" is properly refused.

5. **MUNICIPAL CORPORATIONS**, § 1100*—*when instruction on proximate cause erroneous.* In an action against a city and a railroad company to recover for the death of plaintiff's intestate, where it was alleged that a horse which deceased was driving at the time of the accident was frightened by the blowing of defendant railroad

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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company's locomotive whistle and bolted, causing the wheel of the wagon in which deceased was riding to fall into a large hole or rut in defendant city's public street, throwing plaintiff out and causing his death, an instruction offered by defendant city that the jury should find such defendant not guilty if it appeared that the accident was proximately caused by the blowing of the whistle is properly refused, being bad as ignoring the other element of proximate cause, the defective condition of the street.

6. TRIAL, § 207*—*what is effect of direction of verdict to find one defendant guilty.* In an action against a city and a railroad company to recover for the death of plaintiff's intestate alleged to have been caused by defendants' negligence, a peremptory instruction to find one defendant not guilty leaves only the question of the negligence of the codefendant, and a verdict finding such codefendant guilty fixes its liability independently of the negligence of the other defendant.

7. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to sustain verdict for injuries due to defective street.* In an action against a city and a railroad company to recover for the death of plaintiff's intestate, where it is alleged that the horse which deceased was driving at the time of the accident was frightened by the blowing of defendant railroad company's locomotive whistle and bolted, causing the wheel of the wagon in which deceased was riding to fall into a large hole or rut in defendant city's public street, throwing plaintiff out and causing his death, evidence held sufficient to justify a verdict for plaintiff.

8. APPEAL AND ERROR, § 1523*—*when case not reversed for errors in instructions.* Where the evidence in an action clearly justifies a verdict for plaintiff, or where defendant offers no countervailing evidence, such verdict will not be reversed for errors in instructions unless it is clear that the jury were misled by such instructions in a matter material to the issue.

9. TORTS, § 32*—*when verdict against one tortfeasor justified without regard to negligence of other.* In an action where the declaration charges two defendants with separate acts of negligence contributing to cause the injury sought to be recovered for, a verdict against one defendant is justified without regard to the negligence of the other.

10. APPEAL AND ERROR, § 438*—*when objection as to variance too late.* In an action where the declaration charges two defendants with separate acts of negligence contributing to cause the injury sought to be recovered for, and where a peremptory instruction in favor of one defendant is given, plaintiff going to trial against the codefendant without amending, the objection of variance made for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the first time on appeal comes too late, since if the objection had been seasonably made, plaintiff could have amended by striking the negligence averred against the other defendant, and retaining only the averment of negligence against the defendant found guilty.

11. EVIDENCE, § 154*—*when failure to offer evidence admission of facts.* Where a defendant offers no evidence to meet the case made by plaintiff's evidence, and allows the case to go to the jury on the facts so established, such defendant thereby admits the truth of such facts.

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 3, 1916. Rehearing denied January 17, 1916. *Certiorari* denied by Supreme Court (making opinion final).

JOHN W. BECKWITH and N. L. PIOTROWSKI, for appellant; DAVID R. LEVY, of counsel.

ELMER & COHEN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action on the case for negligently causing the death of plaintiff's intestate, one James P. Hilton, brought against defendant and also the Chicago Junction Railway Company. The cause proceeded to trial under the first and third counts of the declaration, each of which charged two causes of negligence as contributing to the accidental death of Hilton, the negligence charged against the defendant railway company being that it violated a city ordinance by blowing the whistle of an engine which frightened the team Hilton was driving, causing them to bolt. The negligence charged against the defendant city was its permitting a large hole or rut to remain in Emerald avenue, in which the wheel of the wagon Hilton was driving dropped, throwing Hilton from the wagon, which ran over him and killed him.

At the close of plaintiff's evidence the court in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

structed a verdict in favor of the railway company, and the cause was then, without any countervailing proof being offered by defendant, submitted to the jury, which rendered a verdict against the defendant city for \$4,500, upon which a judgment was rendered, and the city brings the record here for our review.

To the court's instruction to the jury to find a verdict for the railway company, counsel for the city interposed no objection.

Defendant complains of the court's ruling on the instructions to the jury. We have examined with care all of the instructions given and refused, and we are satisfied that the jury were sufficiently instructed upon the law of the case as it was submitted to them.

The court gave an instruction of its own motion, against which defendant raises strenuous objection. We are unable to discover any infirmity in this instruction, in fact we rather approve of it. In its essence it instructed the jury that they should take the law from the court and not consider anything as law except as given to them in the written instructions, and decide the case accordingly. Lawyers in their arguments oftentimes tell the jury what they regard the law to be, and at times they misinform them. In such a condition, it is the exercise of wisdom on the part of the court to give an instruction like the one complained of, to counteract the effect of any misinformation concerning the law in which counsel may have indulged in argument.

Because the defendant put in no evidence, the jury were only to consider the case as made by the evidence of plaintiff. There was no occasion for the court to instruct the jury regarding the preponderance of the evidence, and certainly not to give the instruction refused, which told the jury that "if the evidence was equally balanced, they must find for the defendant." The jury were instructed that their verdict must rest upon a preponderance of the evidence and that if

they found the defendant city guilty of the negligence charged against it in the declaration, their finding must be based upon a preponderance of the evidence. But as all the evidence before them was that of the plaintiff, the use of the word "preponderance" in this condition of the record was unnecessary.

Two acts of negligence were charged in the declaration—the blowing of the whistle and the defect in the street—and defendant's proffered instruction that if the accident was approximately caused by the whistle on the engine frightening the horses, they should find the defendant not guilty, was bad, as ignoring the other element of proximate cause, viz., the defective condition of the street. The negligence of the defendant railway company was out of the case by the finding of the jury in its favor.

The only question for the jury was whether the defendant city was guilty of the negligence charged against it in either of the two counts of the declaration. If the jury found the city guilty of the negligence charged in either of the two remaining counts of the declaration, their liability was fixed. Even were there errors in the instruction, this court would not reverse because of such errors, where the evidence so clearly justified a verdict for the plaintiff as in the case at bar, nor in a case where there is no counter-vailing proof, unless it was clear that the instruction challenged misled the jury in a matter material to the issue. *Young v. McConnell*, 110 Ill. 83.

After the railway company was out of the case no amendment was made to the declaration, and defendant contends that this is reversible error. If the defendant city was guilty of the negligence averred against it in the declaration, the jury were justified in their verdict, without regard to the liability of the other defendant. The most defendant can claim, in this condition of the record, is that there was a variance between the charge in the declaration that the

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railway company was guilty, with the other defendant, the city, of concurring negligence, and that the verdict was only against the latter. Defendant made no objection in the trial court on the ground of variance, neither did it there claim that the dismissal of the defendant railway company operated as an amendment to the declaration to that extent. The objection comes too late here. If the objection had been made in the trial court, plaintiff could have readily amended his declaration by striking out the negligence averred against the defendant railway company and by retaining only the averment of negligence against the defendant city. *Frank Parmelee Co. v. Wheelock*, 224 Ill. 194.

The city declined to meet with evidence the case made by plaintiff and allowed the case to go to the jury on the facts as established by plaintiff's evidence, thereby admitting the truth of such undisputed evidence.

The trial was fair, there are no material errors in procedure affecting the city's rights, and the judgment of the Circuit Court is affirmed.

Affirmed.

**M. Hommel Wine Company, Defendant in Error, v.
Theo. Netter, Plaintiff in Error.**

Gen. No. 21,170.

1. SALES, § 329*—*when evidence sufficient to establish acceptance of goods.* In an action to recover the purchase price of wine sold and delivered to defendant, where the defense was that the wine delivered was not in compliance with the contract, and it appeared that defendant inspected the wine after delivery at the dock, that he afterwards refused to return the wine when requested by plain-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tiff to do so, and took the wine from the dock, storing it in a warehouse and refilling some of the barrels and selling a large part of it, *held* that a peremptory instruction for plaintiff on the ground that the facts showed an acceptance with full knowledge of the condition of the wine was proper.

2. SALES, § 153*—*what constitutes an acceptance of goods.* Any act done by the buyer of goods tendered in fulfillment of a contract of sale, which such buyer has no right to do unless he is the owner of the goods, is itself an acceptance of the goods.

3. SALES, § 155*—*when acceptance of goods bar to claim for compensation for defects in goods.* The acceptance of an article sold on an executory contract after opportunity to examine it amounts, in the absence of fraud or latent defects, to an agreement that the article conforms to the contract and was satisfactory and bars all claim for compensation for defects in the article.

4. SALES, § 389*—*when damages on account of inferior quality of goods may not be recouped.* Where there has been an acceptance of goods delivered under an executory contract, damages on account of the inferior quality of the accepted goods cannot be recouped, in the absence of fraud or express warranty, or of latent defects incapable of discovery on inspection.

5. SALES, § 329*—*when not necessary to prove that goods correspond with sample or description.* In order to recover the purchase price of goods sold and delivered under a contract, it is not necessary to prove that the goods delivered exactly corresponded with the sample or with the description thereof in the contract where it appears that defendant received and retained the goods actually delivered, since the law does not permit a vendee to receive and retain the goods delivered under a contract, and afterwards defeat an action for the purchase price on the ground that such goods were not of the exact quality or description called for by the contract.

6. SALES, § 146*—*what is remedy of purchaser of goods not complying with contract.* Where goods tendered in performance of a contract are not in compliance therewith, the remedy of the vendee, in the absence of a warranty, is to refuse the goods, or to return them within a reasonable time after he discovers that they are not as required by the contract.

7. SALES, § 356*—*when evidence as to loss of profits properly excluded.* In an action to recover for wine sold and delivered, where defendant sought to set off or recoup profits alleged to have been lost as a result of the alleged inferior quality of the wine delivered, the exclusion of evidence of such profits *held* not erroneous, it appearing that defendant's conduct amounted to an accept-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ance of the wine with full knowledge of its condition when delivered, and there being no evidence that defendant had a contract for the resale of the wine at the time of making the contract sued on.

8. DAMAGES, § 61*—*when loss of anticipated profits from resale of goods not recoverable.* The loss of anticipated profits from a resale of the goods bought because of defects in the goods is not the measure of damages in an action against the vendor for breach of the contract of sale unless the vendor knew that the vendee had a contract to resell at an advanced price, and that the purchase was made to fulfil such contract.

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

On August 20, 1913, the plaintiff, a corporation, having its principal office at Sandusky, Ohio, commenced an action of the fourth class in the Municipal Court of Chicago against defendant to recover the purchase price, and interest thereon, of certain Catawba wine sold and delivered to defendant, viz.: 43 barrels (2217½ gallons) from cask No. 8, and 17 barrels (873 gallons) from cask No. 7. Plaintiff alleged in its amended statement of claim, *inter alia*, that said 60 barrels of wine were received by defendant and accepted by him. The defendant in his affidavit of merits alleged, in substance, that plaintiff represented that the wine should be like certain samples submitted and should be a good and merchantable wine; that the wine shipped was not like the samples submitted and was not as represented, but was acetic, unsound and decomposed and not fit for human consumption and of no value or use whatsoever; and that defendant refused and still refuses to accept the wine. The defendant also filed a claim of set-off for damages for loss of profits and for expenses incurred in hauling and storing the wine, etc. The case was tried before a jury on November 13, 1914, and at the conclusion of all the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

evidence the court, over the objection of the defendant, instructed the jury as follows: "I have come to the conclusion that this is a case where the defendant, having purchased the wine by description and sample without any express warranty as to its condition, and having had ample opportunity to inspect it when he received it, and having inspected it and accepted it and failed to return it, cannot defend at this time in an action for the purchase price, and your verdict should be for the plaintiff for the amount of the purchase price." Accordingly the jury returned a verdict finding the issues against the defendant and assessing plaintiff's damages at the sum of \$986, and subsequently, on December 5, 1914, the court entered judgment on the verdict against the defendant, which judgment the defendant by this writ seeks to reverse.

The following facts, in substance, were disclosed by the evidence: Prior to March 7, 1913, plaintiff's salesman, McNally, submitted to defendant at Chicago certain samples of wine, and afterwards, on March 7th, defendant signed a written order wherein he directed plaintiff to ship him at Chicago, *f. o. b. Sandusky, Ohio*, about 2174 gallons of "pure catawba wine", to be taken from cask No. 8 in the wine cellar of plaintiff at Sandusky, at the price of 33 cents per gallon. It was mentioned on the face of the order that defendant would furnish cooperage for which he was to be allowed 3 cents per gallon. On May 5, 1913, defendant signed another written order wherein he directed plaintiff to ship him at Chicago, *f. o. b. Sandusky, Ohio*, about 1000 gallons of "dry Catawba" from plaintiff's cask No. 7, at 33 cents per gallon. It was mentioned in the order that the amount of wine to be shipped "by boat with balance" should total 60 barrels and that defendant should be allowed 3 cents per gallon on cooperage. Before said order had been accepted by plaintiff the defendant, on May 12th, wrote plaintiff in part as follows: "I have ordered cask

8, containing about 2174 gals., and the balance of the car with cask # 7, about 1000 gals., at 33¢ per gal., we to be allowed 3 cts. per gal. by furnishing our own cooperage. The cooperage was understood to be f. o. b. Chicago. * * * If you desire to fill this order like samples, kindly let me know by return mail so I can make shipment of cooperage. * * * We wish our own cooperage used." On May 16th plaintiff wrote a letter in reply, in part, as follows: "Everything is satisfactory to us but the barrels. We do not intend to pay freight from Chicago to Sandusky and allow you 3¢ for cooperage besides. * * * We are today expressing you sample of the wine as it is in the cask. Of course, when we ship it it will be filtered nice and clear. * * * If sample is satisfactory you can ship your barrels at once, and we will make immediate shipment by boat." On June 12th defendant wrote plaintiff: "The empty bbls. will go forward tomorrow. * * * You understand this wine must be like samples—about 2174 gals. from cask No. 8 and the balance from No. 7," and on June 16th he again wrote plaintiff: "All the empty bbls. have been shipped now. * * * Please send me the paid freight expense bill on same." The testimony of several of plaintiff's witnesses disclosed that after defendant's barrels had been received by plaintiff the same were cleaned, steamed and sulphured and put in proper condition to receive the wine; that 43 barrels were filled with wine taken from plaintiff's cask No. 8, and 17 barrels with wine taken from plaintiff's cask No. 7; that the wine so taken corresponded with the samples previously taken from said casks and submitted to defendant; that the wine before being put into the barrels was properly filtered and was pure Catawba wine, of good taste and free from foreign substances and acetic acid, and that the barrels were taken to the dock at Sandusky and shipped by water to defendant via Anchor Line, as requested. Plaintiff's evidence

as to the condition and quality of the wine in the barrels at *Sandusky*, and as to it being the same at *Sandusky* as the samples previously submitted, was not disputed. The defendant, an experienced dealer in wines, testified, in substance, that he first saw the barrels of wine in the first part of July, 1913, at the Anchor Line dock in Chicago; that a day or two after the wine arrived he opened about 10 barrels at the dock and took out some of the wine and tasted and inspected it and compared it with the samples previously submitted; that the wine was not as good as the samples, and was not palatable, contained acetic acid, and was unfit for consumption as wine. On July 11th defendant wrote plaintiff to the effect that the wine had been found upon inspection not to correspond with the samples submitted and that he would expect plaintiff to send him wine like the samples. To this letter plaintiff on July 14th replied, expressing surprise and saying that plaintiff could not furnish any different wine than that shipped, as that wine was taken from the same casks as the samples previously submitted and was the same wine, and further saying: "Let us hear from you by return mail what you propose to do, and if you do not accept it, the writer" (W. H. Hommel, secretary and treasurer of plaintiff) "will come to Chicago and attempt to sell it elsewhere and return you your barrels, and we will be out our labor of cleaning, steaming and sulphuring your barrels." Not hearing further from defendant, plaintiff, on July 17th, and again on July 18th, wired defendant requesting a definite reply to plaintiff's letter of July 14th. No reply being received to either the letter or the telegrams, W. H. Hommel, about July 20th, left Sandusky, came to Chicago and called on defendant at his place of business. At this interview, according to Hommel's uncontradicted testimony, defendant said that the wine was not the same as the samples and Hommel insisted that it was. Hommel proposed that plain-

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tiff take it and dispose of it elsewhere but defendant refused to accede to this. Hommel then said that defendant would have to pay for the wine, to which defendant replied that he would not do that and that plaintiff had better go ahead and sue him. Hommel then proposed that he and defendant together go and inspect the wine and see how it compared with the samples, but defendant refused to do this or to inform Hommel where the wine then was, and thereupon the interview ended. The defendant further testified that some days after he had opened the 10 barrels at the dock he removed all of the barrels to a basement warehouse of a friend of his, where he opened 7 or 8 other barrels and inspected and tasted the wine therein contained, and that 8 or 9 days afterwards, about July 23rd, he took certain samples of the wine drawn from different barrels, which in the meantime he had kept in his office, to a consulting chemist, named Norton, who examined and tasted the same and made a report to defendant. This chemist was one of defendant's witnesses at the trial and he testified to the effect that the samples of wine so submitted to him at that time contained acetic acid, and that the wine was not palatable, had a tart, sour taste and was almost vinegar, and had no value as wine but only would have a value when it would become vinegar. On July 30th defendant wrote plaintiff, in part, as follows: "I employed a consulting expert to examine the wine and he pronounces it inferior and unmarketable and not the same wine as the sample I bought by. Now, I demand that you send me within 10 days from this date the exact kind of wine I bought from you and if you do not, I shall expect you to compensate me for the loss I will have sustained by your failure so to do." To this letter plaintiff replied on August 1st, in part, as follows: "If you mean to accuse us of sending you a different kind of wine than what we sold you, you have

got the wrong bull by the horn. * * * We have sent you nice, pure Catawba wine. * * * You will not have to wait 10 days. * * * We want your reply by return mail whether you want this wine, or whether you will give it up to us for further disposal. We will take it off your hands without any expense to you whatever and will gladly return your barrels when they are empty. We will also pay the freight which we have already done on your barrels from Chicago to Sandusky, and more than that we will not do. * * * You can wire us at our expense what you intend to do." And on August 2nd defendant wrote plaintiff acknowledging receipt of plaintiff's letter of August 1st, and saying in part: "In view of your attitude, I shall have only one alternative left, for it is very evident from your letter that you are not desirous of either sending me the goods I ordered, or to compensate me for the loss and damage I will suffer by your failure. The damage accruing to me from your failure to send the quality ordered on the 3090½ gallons of wine is, approximately, \$772.50. * * * I have come to the conclusion that *I will be justified in selling* the inferior wine you have sent me at the very best price I can obtain for the same, and I will apply the proceeds from this on account of the amount you owe me, approximately, \$772.50. * * * I trust you will either send me the wine I ordered, or a check in the amount of \$772.50 at your early convenience." Seemingly, no further letters passed between the parties, and on August 20th plaintiff commenced the present action.

On cross-examination the defendant testified, in substance, that shortly after the wine arrived in Chicago and he had inspected it he made up his mind that he could not take the wine and sell it as wine; that he afterwards had the expert, Norton, test the wine shipped and the samples previously submitted, for the purpose of obtaining proof that the wine was not good wine and was not the same as the samples previously

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submitted; that he afterwards ascertained that the wine had no value to him because he could not sell it; that the wine was stored in a warehouse; that he did not know exactly whether or not all of the 60 barrels had been opened; that he had refilled some of the barrels with wine taken from the other barrels; that he did not have all of the 60 barrels of wine on hand; and that he had disposed of some of the barrels of wine by selling them "for cash to pay the storage." On redirect examination he testified that he had sold about 18 barrels of the wine, all from cask 7, "ninety days ago."

Defendant further testified that in making the purchase of the wine he had intended to carbonate or charge it, and to put the carbonated wine in cases containing pint or quart bottles, and that ordinarily about 20 of such cases of wine could be procured from one barrel. He offered to prove that his net profit on each case of carbonated wine would have been \$2, or on 1200 cases a total net profit of \$2400, but the court would not allow him to so testify.

BENJAMIN F. J. ODELL, for plaintiff in error.

SCOTT, BANCROFT & STEPHENS, for defendant in error; JOHN E. MACLEISH, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

There is no dispute as to the quantity of the wine received by defendant or as to the total purchase price thereof. No point is made as to the verdict being excessive in amount on the ground that interest on said purchase price was included in the verdict. The main contention of counsel for defendant is that the trial court erred in directing a verdict in favor of plaintiff in any amount.

After due consideration of all the evidence we are of the opinion that the court's action in directing a

verdict in favor of the plaintiff was proper. We think that the evidence clearly shows that the wine, after its arrival in Chicago, was inspected by the defendant and with full knowledge of its condition was accepted by him. While he at first notified plaintiff that he would not accept the wine because he claimed that the same was not like the samples previously submitted to him, yet he afterwards refused to return the wine to plaintiff when requested so to do, and took the wine from the dock and stored it in a warehouse, and afterwards refilled some of the barrels and also sold a large portion of the wine. "Any act done by the buyer of goods tendered in fulfillment of a contract of sale, which he would have no right to do if he were not the owner, constitutes, of itself, an acceptance of the goods." (*Wolf Co. v. Monarch Refrigerating Co.*, 252 Ill. 491, 502.) In *Barker v. Turnbull*, 51 Ill. App. 226, 229, quoted with approval in *McLeod v. Andrews & Johnson Co.*, 116 Ill. App. 646, 649, it is said: "This court held in *Eureka Cast Steel Co. v. Morden Frog Works*, 23 Ill. App. 591, that, in the absence of fraud or latent defects, the acceptance of an article sold upon an executory contract after an opportunity to examine it, amounted to an agreement that the article conformed to the contract and was satisfactory, and barred all claim for compensation for defects existing in the article. Where there has been an acceptance after an opportunity to inspect the goods delivered under an executory contract, damages because of the inferior quality of the accepted goods cannot be recouped in the absence of proof of fraud, or express warranty by the vendor, or of latent defects incapable of discovery on inspection." In the instant case the evidence clearly discloses that the wine was sold by samples, upon which samples the defendant relied, that there was no express warranty upon which defendant relied, that the defendant had ample opportunity to inspect the

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wine after it was received, that there were no latent defects in the wine incapable of discovery on inspection, and that no fraud was practiced by plaintiff on defendant. In the case of *America Theatre Co. v. Siegel, Cooper & Co.*, 221 Ill. 145, the defendant gave a written order to plaintiff for the delivery to defendant at a price named of a certain number of opera chairs, "same as sample shown" and "backs to be upholstered in red plush, same quality as sample submitted." Plaintiff delivered the chairs and subsequently brought suit against defendant for the purchase price. On the trial at the close of all the evidence the court instructed the jury to return a verdict in favor of plaintiff for the full purchase price of the chairs, upon which verdict judgment was entered. It was contended that this action was erroneous in that plaintiff had failed to prove that the chairs delivered complied with the description contained in the order and that the chairs were of the same quality and description as the sample exhibited to defendant. In affirming the judgment our Supreme Court said (p. 147):

"The evidence offered by appellee showed that the chairs which were delivered were 'K. D.' opera chairs, with iron frames and upholstered backs, and that appellant received and retained them and had them set up in its opera house for use. With this proof in the record it was not necessary for appellee to prove that the chairs exactly corresponded with the sample or with the description contained in the contract. The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered."

It is also contended that the trial court, in connection with defendant's claim of set-off or recoupment, erred in refusing to admit in evidence defendant's offered testimony relative to his alleged loss of profits. Under the facts of this case and for reasons above stated we do not think that the court erred. Furthermore, the loss by a purchaser of goods of anticipated profits from a resale of the goods because of defects therein is not the measure of damages unless the seller knew that the buyer had an existing contract to resell at an advanced price, and that the purchase was made to fulfil such contract. (*Rhea Implement Co. v. Racine Co.*, 89 Ill. App. 463.) There was no evidence that the defendant, at the time he purchased the wine, had an existing contract with any one to resell the wine at an advanced price, and there was no evidence introduced or offered that defendant had lost any actual profits, as distinguished from probable or speculative profits.

The judgment of the Municipal Court is affirmed.

Affirmed.

John Cichon, Defendant in Error, v. Marie Gartner and Franz Gartner, Plaintiffs in Error.

Gen. No. 21,218. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

Action by John Cichon, plaintiff, against Marie Gartner and Franz Gartner, defendants, in the Municipal Court of Chicago, to recover a broker's commission for procuring a sale of defendant's house. To reverse a judgment for plaintiff for \$120, defendants prosecute this writ of error.

Plaintiff's statement of claim alleged a contract between plaintiff and defendants to procure a purchaser for the house, and that plaintiff procured such a customer, to whom the house was later conveyed for \$2,525, and that plaintiff was entitled as commission to 5 per cent. of such price. Defendants' affidavit of merits denied the contract alleged or that plaintiff rendered any services in procuring such purchaser.

Plaintiff's testimony was that in June, 1914, he called upon Franz Gartner in company with one Rytanski and asked if the property was for sale and Gartner replied that defendants would sell for \$2,700, or less for cash and that Gartner also said that if plaintiff procured a purchaser at a satisfactory price he would pay a commission. Plaintiff was corroborated by Rytanski as to the above facts. Franz Gartner denied the conversation, and Marie Gartner testified that she never saw plaintiff. Plaintiff further testified that for a sale of such property at the price for which defendants sold, the commissions were 5 per cent. Joseph Olsowki testified that he was an em-

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ployee of plaintiff, and was directed to find a purchaser for defendants' property; that he submitted the property to Marcinkiewicz; that on September 8, 1914, he and Marcinkiewicz called on Franz Gartner and informed him that he was an employee of plaintiff, and that the contract for the purchase of said property was then signed by Marcinkiewicz and Franz Gartner in the presence of the witness. Marcinkiewicz testified that Olsowki was the only one who called his attention to the property; that on September 8, 1914, he and Olsowki called on defendants and then signed a contract for the purchase of the property at the agreed price of \$2,525, and that subsequently he received a deed to the property from defendants.

On the cross-examination of Olsowki and Marcinkiewicz, it appeared that *after* the sale Marcinkiewicz, at Olsowki's request, paid *Olsowki* the sum of \$10 "for finding the house."

There was no evidence that there was any agreement between plaintiff and Marcinkiewicz that if plaintiff should find a satisfactory house for Marcinkiewicz the latter would pay a commission.

The action was tried by the court without a jury, and the court found the issues in favor of plaintiff.

OTTO C. RENTNER, for plaintiffs in error.

SONNENSCHN, BERKSON & FISHELL, for defendant in error; HERBERT M. LAUTMANN, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 88*—*when evidence sufficient to establish contract to procure purchaser.* In an action to recover a broker's commission for the sale of a house, where defendant denied making a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pellum v. Mead, 187 Ill. App. 396.

contract with plaintiff to procure a purchaser, but where plaintiff was corroborated by another witness, a finding that such contract was made, *held* not against the weight of the evidence.

2. BROKERS, § 91*—*when evidence insufficient to establish unfair dealing such as to bar recovery.* In an action to recover a broker's commission for the sale of a house, unfair dealing such as to bar a recovery is not shown by the fact that after the sale plaintiff's employee asked and received \$10 from the purchaser "for finding the house," where there was no evidence that there was a contract between plaintiff and the purchaser for the payment to plaintiff by such purchaser of a commission in case plaintiff found the house, and where there was no evidence that the acts of plaintiff's employee were with the knowledge or by the direction of plaintiff.

3. BROKERS, § 62*—*when right to commission not barred by receipt of commission from other party.* The rule that a broker, acting as the agent of both parties in an exchange of real estate with a contract for the payment of commission from each party, cannot recover from one of them who did not know of or consent to his employment by the other has no application to a case where plaintiff's agent, without his knowledge or direction, asks and receives such a commission from the purchaser of a house, for the sale of which plaintiff is seeking to recover a commission from the seller.

Thomas Pellum, Defendant in Error, v. Aaron B. Mead, Plaintiff in Error.

Gen. No. 20,425. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed January 11, 1916.

Statement of the Case.

Action by Thomas Pellum, plaintiff, against Minnie Hawkins and Aaron B. Mead, defendants, in the Municipal Court of Chicago, to recover for goods alleged to have been negligently destroyed in tearing down

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

a barn in which the goods were stored. To reverse a judgment for plaintiff, defendant Mead prosecutes this writ of error.

OTA P. LIGHTFOOT, for plaintiff in error Aaron B. Mead.

GEORGE W. ELLIS and RICHARD E. WESTBROOKS, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 173*—*what is duty of agent allowing goods to be stored without authority to protect goods.* One who without authority rents a barn to another for the storage of goods incurs no special duty to protect such goods.

2. PRINCIPAL AND AGENT, § 173*—*what duty agent tearing down barn owes owner of stored goods.* In the absence of any privity of contract or relationship between the agent of an estate and one who without authority stores goods in a barn on such estate, such agent in tearing down such barn owes the owner of the goods no duty further than to exercise reasonable care to protect them until the owner has a reasonable opportunity to remove them.

3. NEGLIGENCE, § 162*—*when evidence admissible that goods not taken away or destroyed.* In an action against the agent of an estate to recover for goods alleged to have been negligently destroyed by defendant in tearing down a barn in which the goods were stored, and where the record does not show what became of the goods, it is error to exclude evidence tending to prove an averment in defendant's affidavit of merits that no goods were taken away or destroyed as alleged.

4. TORTS, § 30*—*when evidence insufficient to establish joint liability.* In an action against two defendants to recover for goods alleged to have been negligently destroyed in tearing down a barn where the goods were stored, the record fails to show a joint liability where it appears therefrom that one defendant was the agent of the estate to which the barn belonged and the other defendant was the tenant of a cottage on such estate who had rented the barn to plaintiff without authority from the owner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Amanda Gerlock, Plaintiff in Error, v. John W. Conroy, Defendant in Error.

Gen. No. 20,629. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. Lockwood HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed January 11, 1916.

Statement of the Case.

Action of assumpsit on a breach of promise of marriage by Amanda Gerlock against John W. Conroy. From a judgment for defendant upon a directed verdict, plaintiff appeals.

L. A. KAPSA and CHARLES C. SPENCER, for plaintiff in error.

JOHN W. SUTTON, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

TRIAL, § 195*—*when improper to direct verdict*. Where the evidence is conflicting, its weight is for the jury and not for the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

L. H. Brink and Ignatz Pilat, trading as Brink and Pilat, Plaintiffs in Error, v. M. Finkelstein and Sam Rosenthal, Defendants in Error.

Gen. No. 20,835. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

Action by L. H. Brink and Ignatz Pilat, trading as Brink and Pilat, against M. Finkelstein and Sam Rosenthal for goods sold and delivered by plaintiffs to defendants at plaintiffs' request. From a judgment for defendants, after a trial by the court, plaintiffs appeal.

Plaintiffs were commission merchants and Finkelstein was a dealer in poultry. Rosenthal was Finkelstein's real estate agent and accommodated him at times by giving him checks for cash. The goods sued for were sold and delivered to Finkelstein between December 9 and 14, 1912. Plaintiffs had previously sold and delivered to him similar goods and received payments therefor in the form of checks signed by Rosenthal. It was claimed by plaintiffs that before the sale and delivery of said goods, Rosenthal had promised to pay for them over the telephone. Rosenthal denied that he had made any such promise, or that he ever talked over the telephone to or saw plaintiffs until after the transactions sued on were had, when he endeavored to effect a settlement. He said that when he gave the checks in question it was for cash given him by Finkelstein to the amount of plaintiffs' bills. He was corroborated by Finkelstein.

Q. J. CHOTT, for plaintiffs in error.

Haupt v. Chicago City Railway Co., 197 Ill. App. 400.

NICHOLAS J. PRITZKER, for defendant in error Sam Rosenthal.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

FRAUDS, STATUTE OF, § 126*—*when evidence sufficient to sustain finding that promise not original.* Where a merchant sold goods to another at different times and customarily received the check of another person in payment, *held*, in action against the buyer and such other person for goods sold and delivered, in which the only question was whether such other person had made an original promise to pay for the goods, that a finding by the court that such promise had not been made was sustained by the evidence.

Marie Haupt by John D. Casey, Guardian, Appellee, v.
Chicago City Railway Company, Appellant.

Gen. No. 20,931.

APPEAL AND ERROR, § 1514*—*when improper argument of counsel reversible error.* Where, in an action by a five-year-old girl against a street railway company for damages for personal injuries, necessitating the amputation of a leg, counsel for plaintiff in his argument gave his individual opinion as to the amount of damages stated that the verdict should be for an amount sufficient to support plaintiff for the rest of her life, made reference to her humble circumstances, alluded to her going down "into the valley of the shadow of death" while under the anesthetic, discussed her mental pain and spoiled matrimonial prospects, and when objection was made by defendant's counsel, repeatedly continued his argument without giving opportunity for a prompt ruling, and without rebuke by the court, and remarked that defendant's counsel was trying "to break up his argument," that he "expected it" and called the jury's attention to the fact that he was being "interrupted and bully-ragged every minute," and withdrew improper statements repeatedly "to save time," without a ruling by the court, *held* that the judgment should be reversed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Haupt v. Chicago City Railway Co., 197 Ill. App. 400.

Appeal from the Superior Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed January 11, 1916.

Statement by the Court. This is a suit brought by appellee, a minor aged five years at the time of the accident and eight at the time of the trial, to recover damages for loss of a foot, the amputation of which was necessitated by being run over by one of appellant's cars. The verdict and judgment were for \$12,000. The following are excerpts from the record of the proceedings during the course of argument to the jury by plaintiff's attorney:

Mr. R. " * * * The time will come, and is not very far distant, when she will realize, when she will know the pain of mind that comes from realizing that you are a cripple.

Mr. H. I object to that argument.

Mr. R. That you must go all your life in that condition.

Mr. H. Wait a minute, I object to that argument.

Mr. R. I do not want to waste my time, I will go on to something else.

Mr. H. I object to this argument by counsel.

Mr. R. My time is limited.

Mr. H. I do not think that is any element that ought to be argued, realization that she is to be a cripple.

Mr. R. Pain of mind I understand to be an element. I do not want to have this time taken up unduly, but I think that is a fair subject to argue to the jury, and the law says so, too.

Mr. H. I object to it.

The Court. All right, go on, Mr. Rathbone."

(Exception to ruling and remarks.)

Mr. R. "Who is going to marry a cripple with her foot off? Now the only hope for her is to go out and do something. What is she fitted for?"

(Objection sustained. Exception to remarks.)

Mr. R. "If there is any question about it, gentle-

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men, I withdraw it. Now here—you know just what the future before that child is—what is the use of our beating around the bush—you know perfectly well what she has got to do. If she is to be anything, or do anything, she has got to go out and earn a living, or attempt to do so; unless this jury does what we consider the fair and right thing. Now here. What ought to be a sufficient sum to maintain that child? What is she really damaged? * * * Yes, I know your game. I didn't interrupt you. I know you are taking all my time you can, and trying to break me up before this jury. I know it, and I expected it. * * * The pain she suffered there at that time, the pain she underwent when she went down under the anesthetic into the valley of the shadow of death—

Mr. H. I object to that.

Mr. R. When she came out—

Mr. H. I object, wait a minute.

Mr. R. I withdraw it. I am not going to have my time taken up. I have only got a few minutes more.

Mr. H. I object, your Honor.

Mr. R. I withdraw it to save time—anything to get the time that you have taken.

Mr. H. Will you wait a minute?

Mr. R. No.

Mr. H. I object to that statement of counsel, and in spite of the withdrawal, I wish to preserve an exception to the making of the remark. You cannot stick a knife in and then pull it out and not leave a hole." (Exception entered.) * * *

Mr. R. "What would be a fair compensation for this girl? What ought to keep her through her life? I say to you she can not have an investment at a much safer percentage than five per cent. What would that bring her? Would you ask this girl, in her condition, to live on less than \$1,000 a year? Don't you think that would be fair and right? When everything now, and everything that she has got to meet and take care of is taken into consideration? Do you mean to say that would be too much? Now, gentlemen of the jury, consider it well. What would that be? At five per cent. that would be—

Mr. H. That is objected to.

Mr. R. \$20,000.

Mr. H. Wait a minute, I object to that.

Mr. R. Is that too much?

Mr. H. I object to the argument, if your Honor please, that there is anything in the law that allows any damages based on a percentage derived from a principal, for the reason that the principal never comes back to the other party. It is not—

Mr. R. Oh, now—

Mr. H. Wait a minute.

Mr. R. Yes.

Mr. H. It is a wrong argument. It has no foundation in law, and it should not be made. He cannot argue here that there is some principal from which an income is to be derived. I object to it.

The Court. The objection is sustained." (Exception to remarks.)

Mr. R. "Of course I know now, gentlemen, what is a fair compensation for this girl, what she ought to have. I have pondered this thing well. I will give you my opinion for what I think it is worth—what would be sustained in this court or any other court, and be fair and square. Taking into consideration all the pain of body and mind that she has suffered, the money loss that she would have; all the pleasures she will be deprived of. Gentlemen of the jury, what does it mean? Is \$20,000 too much? I say that it is not when everything is considered. Would you ask her or any human being to live on less than that or to get along? Do not turn her away now, even if she is in humble circumstances. Do not scale that down or make it too small.

Mr. H. I object to that.

Mr. R. Now gentlemen, I know—

Mr. H. Wait a minute.

Mr. R. I know you will try to break me up.

Mr. H. I know when I make an objection, it is usual and customary among lawyers to stop until the objection can be passed upon.

Mr. R. Yes.

Haupt v. Chicago City Railway Co., 197 Ill. App. 400.

Mr. H. I object to the statement that 'she is in humble circumstances.'

Mr. R. Well, I will cast that out.

The Court. The objection is overruled." (Exception to ruling and remark.)

Mr. R. Yes, I know, take it out. I will withdraw that, or anything to get along and present this case in a connected way to this jury.

Mr. H. Yes.

Mr. R. You know no lawyer can speak to any advantage when he is being interrupted and bully-ragged every minute. I didn't do it to him. But, gentlemen of the jury you know the truth and justice of this case. I have told you what she ought to have in my opinion. I stake my opinion and reputation upon it that it is not too much, unfair or unreasonable.

Mr. H. I object to that, I object to that.

Mr. R. I believe that is just.

Mr. H. I object to that, "I stake my opinion and reputation on that."

The Court. "The objection is sustained." (Exception to the remark.)

Mr. R. "Gentlemen, I see that I cannot make much of a talk here to-day, but I don't care what it is, you can judge between us both. * * * I have told you what I believe this amount ought to be and I ask you to give it. I ask you to give that amount as a fair, square compensation; I ask you with all earnestness, gentlemen: Do justice to this little girl, do justice to her and as long as you live you will never have cause to regret it."

FRANKLIN B. HUSSEY and CHARLES LEROY BROWN,
for appellant; JOHN R. GUILLIAMS, of counsel.

HENRY R. RATHBONE, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

The only error assigned necessary to consider is that relating to remarks of counsel for plaintiff dur-

ing his address to the jury. Because their prejudicial effect is made more apparent when viewed in their entirety they have been quoted in the foregoing statement at some length.

Besides the impropriety of some of them, two things were manifest in the course of the trial,—that there was unrestrained departure from the lines of proper argument and comment, and laxity in enforcing recognized rules of procedure. But for the latter the former would rarely occur and occasions for review would be lessened. But if the presiding judge neglects his duty to guide the trial and exercise the power to prevent abuse of argument and improper comment before the jury, it cannot be expected that the judgment will pass review. And if counsel will not take warning from the numerous decisions on this subject to refrain from transgressing the well-known limitations a fair trial and dispassionate consideration of the evidence prescribe, they must attribute the loss of benefits to their excess of zeal or indiscretion and not to a disposition of reviewing courts lightly to disturb the verdict of a jury. It is as essential to the attainment of justice as to the dignity of the court that abuses of this sort should not be tolerated.

To be specific. On several occasions when defendant's counsel sought a ruling on his objections he was compelled, apparently without assistance of the court, to dissuade plaintiff's counsel from pressing the argument objected to before a ruling could be obtained. The exercise of the undoubted right to demand a ruling on objections was not only repeatedly interfered with by continuing the line of argument without giving opportunity for a prompt ruling, but freely characterized, without rebuke or admonition of the court, as purposely intended "to break up" counsel's argument. To emphasize it, he declared that he "expected it," and knew opposing counsel would try "to break him up," and instead of appealing to the court if he

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needed protection, invited the jury's consideration of his disadvantage in being "interrupted and bully-ragged every minute." Remarks of this kind were improper even when the rulings were in his favor. But when against him they took the form of appealing from judge to jury of the impropriety not only of counsel's "interruptions" but of the rulings of the court. When the court sustained objection to the remark as to his client's matrimonial prospects, he said to the jury, "what is the use of our beating around the bush?" When objection was sustained to "staking his opinion and reputation" as to what the damages should be, he said: "Gentlemen, I see that I can not make much of a talk here to-day, but I don't care what it is, you can judge between us both. * * * I have told you what I believe this amount ought to be and I ask you to give it."

Again, when improper remarks were objected to they were withdrawn frequently with the remark that it was done "to save time" and without a ruling of the court, thus leaving the jury to consider both their propriety and the necessity of counsel's suggested sacrifice.

We cannot believe that such procedure was without prejudice to defendant, and its extent cannot be measured. It was calculated to warp the jury's judgment as to the evidence as well as the amount of the verdict. A remittitur would not cure the error even if we were disposed to regard the amount of the verdict as excessive. It was at least large.

It was the duty of the court to pass on objections when made that the jury might be guided by its rulings, and it was the duty of counsel to stop his argument until the ruling was made. It was the court's duty not only to require him to cease, but not to permit his reflections on the exercise of the legal right to interpose objections. It was for the court to pass upon the grounds and not for the jury on the motives

of objections. Being unacquainted with technical procedure or the necessities therefor, the jury should not have been left by absence of the proper conduct and guidance of the trial to infer that the objections were resorted to as a mere device to interrupt counsel's argument and consume his time. We would not reverse for occasional infractions of this kind, but when they are so numerous as to show a clear disregard of the settled course of procedure designed to insure a fair hearing and protect parties to a trial from injustice, we are constrained to reverse the judgment even though it might otherwise stand. The responsibility of the result is not with us, but that of upholding the guaranties surrounding a fair trial is.

But if the unwarranted obtrusion of counsel's individual opinion as to the amount of damages, the argument that the basis of the verdict should be an amount sufficient to produce an income that would support the minor the rest of her life, the reference to her "humble circumstances," the allusion to her going down "into the valley of the shadow of death" while under the anesthetic, and the discussion of mental pain and spoiled matrimonial prospects, would not separately call for a reversal of the judgment, when taken together in connection with the course of procedure above alluded to, they undoubtedly would.

Reversed and remanded.

Plew v. Board, 197 Ill. App. 408.

**James E. Plew, Appellee, v. E. M. Board et al.,
Appellants.**

Gen. No. 21,040.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim does not state ground of liability in action against officers of corporation for corporate debt.* A statement of claim in an action in the Municipal Court of Chicago against the officers of a corporation on notes of the corporation alleging that the notes purported to have been executed by the United Publishing Company, a pretended corporation; but that said corporation had never complied with the laws of the State relating to corporations, and had never been authorized or licensed to execute said notes, or otherwise transact business in the State; but that such notes were the obligations of the defendants as makers, such defendants being or pretending to be stockholders, officers, agents and the board of directors of such corporation, and assuming as such to exercise corporate powers under such corporate name, *held* not to state a ground of legal liability.

2. CORPORATIONS, § 297*—*nonliability of officers assuming to exercise corporate powers of foreign corporation.* The General Incorporation Act, Sec. 18 (J. & A. ¶ 2531), which makes persons assuming to exercise corporate powers of a corporation liable under specific circumstances for debts contracted by them in its name, has no application to the failure of a foreign corporation to take out a license to do business within the State.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when necessary that statement of claim disclose ground of legal liability.* A statement of claim in a fourth class case in the Municipal Court of Chicago must show a ground of legal liability.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed. Opinion filed January 11, 1916.

SAMUEL SHAW PARKS, for appellants.

FREDERICK A. FREEBARK, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE BARNES delivered the opinion of the court.

Appellee brought suit against appellants and others to recover the principal and interest on two promissory notes, copies of which are set forth in the statement of claim, which avers that they were "notes purporting to have been executed by the United Publishing Company, a pretended corporation; but * * * that said corporation * * * never has complied with the laws of this State relating to corporations, * * * and never has been authorized or licensed to execute said notes, or otherwise transact business in this state; but that said notes are the obligations of the first four above named defendants as makers, said defendants being or pretending to be stockholders, officers, agents, and the board of directors of said corporation, and assuming as such to exercise corporate powers under said corporate name." The notes were dated at Chicago, Illinois, and bear the signature: "The United Publishing Company, By H. L. Bird, President, By E. M. Board, Treasurer." They also bear a corporate seal containing the company's name and the words "Corporate Seal, 1911, Delaware." Appellants filed their affidavit of defense denying liability, but as a stipulation as to the facts has been stricken from the transcript of the record, the assignments of error rest on the common-law record and present as the only question whether or not the statement of claim states a ground of legal liability.

While the statement of claim alludes in one part to a "pretended" corporation, taken as a whole it must be regarded as recognizing as the real ground of action that the United Publishing Company was a foreign corporation and had not been licensed to transact business in this State as required under our act regulating foreign corporations. To avoid this construction, counsel for appellee suggests that the averment that said company was not licensed to do

business in this State should be treated as surplusage, and the rest of the pleading be given the most favorable intendments and presumptions. But so to do would be in violence of the pleading's most reasonable construction; for outside of this averment it contains mere generalizations or conclusions which seemingly allude to the alleged fact of noncompliance with said act, which is the only specific fact alleged in the statement of claim from which the basis of liability can be inferred. The action was manifestly brought on the theory that officers and directors of a foreign corporation that has not taken out a license to do business in this State are liable for the debts it incurs in this State. This is the only reasonable construction that can be given to the statement of claim.

But it is erroneous to suppose that such a state of facts will support a cause of action against the company's officers. It is the corporation itself and not its officers or agents that is subject to the penalties prescribed by our act regulating foreign corporations for failure of the corporation to comply with its provisions (Hurd's Rev. St. 1911, ch. 32, ¶ 67g, J. & A. ¶ 2531); and it is too obvious for discussion that section 18 or the General Incorporation Act (J. & A. ¶ 2435) which makes persons assuming to exercise corporate powers of a corporation liable under specific circumstances for debts contracted by them in its name, has no application to the failure of a foreign corporation to take out a license to do business in this State.

Inasmuch as the statement of claim fails to disclose any ground of legal liability on the part of appellants or to state a cause of action, the judgment cannot stand, and, therefore, it must be reversed. (*Gillman v. Chicago Rys. Co.*, 268 Ill. 305.)

Reversed.

George Hoey, Defendant in Error, v. Alcazar Amusement Company, Plaintiff in Error.

Gen. No. 21,055. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916. Rehearing denied January 25, 1916.

Statement of the Case.

Action by George Hoey, plaintiff, against Alcazar Amusement Company, defendant, to recover money under a written contract for a theatrical performance given, and damages for refusal of defendant to permit plaintiff to perform for the balance of the time stipulated in the contract. From a judgment for plaintiff, defendant appeals.

The contract began with a recital that it was an agreement between said company and "In Old New York (Geo. Hoey, Mgr.)," to be designated thereafter in the contract as manager and artist respectively. By its terms the manager engaged the artist "in his specialty or act" for a period of one week commencing July 6th, at the price of three hundred and fifty dollars.

Defendant urged that it was not a contract between the parties because Hoey was not referred to as a party in the body thereof. The contract was signed by each of the parties and the evidence tended to show that the term "In Old New York (Geo. Hoey, Mgr.)," was a name used by Hoey to designate his company of performers composed of himself and his employees, and that defendant knew it was dealing with Hoey personally and no one else.

The court refused to permit defendant to prove whether or not one Jacobs employed by the booking

Hoey v. Alcazar Amusement Co., 197 Ill. App. 411.

agency that negotiated the contract between Hoey and said company reported to the latter a conversation he had with Hoey.

The court also excluded a letter from said booking agency to the defendant purporting to accept for Hoey defendant's cancellation of the contract. There was no proof that it had any authority so to do, nor evidence justifying the cancellation.

A clause in the contract that a failure on the part of either party to perform "such week" should not be deemed a violation of its terms by either party. In framing the contract the parties used a printed form of the booking agency designed to cover various situations.

FRANK P. LEFFINGWELL, for plaintiff in error.

ADOLPH MARKS, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 385*—*when evidence sufficient to establish contract.* In an action by a theatrical performer against a theatrical company to recover money under a written contract for a performance given, and damages for refusal to permit plaintiff to perform for the balance of the stipulated period, evidence held sufficient to establish a contract.

2. CONTRACTS, § 196*—*when printed words do not control.* An amusement company cannot escape liability upon a written contract with a theatrical performer for one week's service because of the fact that the contract provides that a failure on the part of either party to perform "such week" shall not be deemed a violation of its terms by either party, it appearing that the parties used a printed form designed to cover various situations, including those for a longer term than one week, and this clause referred to a situation where a contract was made for more than one week.

3. CONTRACTS, § 377*—*when evidence of conversation properly excluded.* In an action by a theatrical performer against a theatrical

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Moses v. Jacobsohn, 197 Ill. App. 413.

company to recover money under a written contract for a performance given, and damages for refusal to permit plaintiff to fulfil the contract, *held* that evidence to prove whether or not a certain person employed by the booking agency which negotiated the contract reported to defendant a conversation he had with plaintiff was properly excluded, as such conversation did not tend to show an admission by plaintiff or that he had abandoned the contract.

4. CONTRACTS, § 377*—*when letter by third person purporting to accept cancellation properly excluded.* In an action by a theatrical performer against a theatrical company to recover under a written contract for a performance given, and damages for refusal to permit plaintiff to fulfil the contract, *held* that a letter from a booking agency which negotiated the contract to the defendant purporting to accept for plaintiff defendant's cancellation of the contract was properly excluded, there being no proof that it had any authority to so do, nor evidence justifying the cancellation.

**Albert Moses, Defendant in Error, v. Lazar Jacobsohn,
Plaintiff in Error.**

Gen. No. 21,069. (Not to be reported in full.)

ERROR to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

Albert Moses, plaintiff, brought an attachment suit against Lazar Jacobsohn, defendant, on the ground that defendant was a nonresident of the State and owed plaintiff a sum of money. The defendant put in a general appearance. On judgment for the plaintiff for damages and costs, the defendant brings error.

WILLIAM M. LAWTON and H. C. LINDSEY, for plaintiff in error; MAXWELL R. HERMAN, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carlson v. Swenson, 197 Ill. App. 414.

SAMUELS & SAMUELS, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1301*— *when presumed trial court heard evidence to support judgment.* Where in an attachment suit the record shows that the trial court heard evidence and found against the defendant both as to the attachment and the merits of the action, but entered judgment on the main issues only the reviewing court will, in the absence of a bill of exceptions, presume that the trial court heard sufficient evidence to support the judgment, and it is immaterial whether any judgment was entered on the attachment issue.

Howard Carlson by C. G. Carlson, Defendant in Error,
v. Simeon Swenson, Plaintiff in Error.

Gen. No. 21,086. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

Action by Howard Carlson, a minor, by C. G. Carlson, his next friend, plaintiff, against Simeon Swenson, defendant, to recover for personal injuries sustained by the plaintiff by having fall on him a radiator placed in the lobby of the defendant's theater. From a judgment for the plaintiff, the defendant brings error.

ALBERT O. OLSON, for plaintiff in error; JAMES J. LEAHY, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

JOHN E. ANDERSON, for defendant in error; GEORGE B. COHEN, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 538*—*when error in refusing motion to direct verdict not preserved for review.* Where on the court's refusal of the defendant's motion for a directed verdict made at the close of the plaintiff's case, the defendant introduces proof and fails to renew his motion at the close of all the evidence, the point that such refusal was erroneous is not preserved for review.

2. APPEAL AND ERROR, § 800*—*when motion for new trial and ruling thereon need not appear in bill of exceptions as basis for review.* Since the Amendment of 1911 to section 81 of the Practice Act (J. & A. ¶ 8618) dispensing with the necessity of incorporating formal exceptions in the record, it seems that the former rule of practice, requiring that to preserve for review the refusal of a new trial the motion therefor and ruling thereon must appear in the bill of exceptions, no longer applies where the transcript of the record contains a specific order of the court overruling and denying the motion as such order presumably would not have been entered had the motion not been made, and as it need not have been in writing nor an exception to the ruling preserved, the reason for the rule has failed.

3. THEATERS AND SHOWS, § 4*—*when evidence sufficient to sustain verdict for damages for personal injuries.* A verdict for the plaintiff for personal injuries is not manifestly against the weight of evidence where the evidence tends to show that defendant conducted a theater on his premises, in the lobby of which were pictures and advertisements hung for the public to come in and see, and that in the wall of the lobby a radiator was so insecurely fastened that without apparent negligence on the part of the plaintiff, a minor, it fell out of its place upon him and injured him while he was looking at the pictures, the circumstances being such as to raise the inference of neglect on the part of defendant to have the radiator so fastened that it would not fall over from contact with it such as might be expected in a public place.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ripon v. Alcazar Amusement Co., 197 Ill. App. 416.

Alf. Ripon, Defendant in Error, v. Alcazar Amusement Company, Plaintiff in Error.

Gen. No. 21,104. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 11, 1916. Rehearing denied January 25, 1916.

Statement of the Case.

Action by Alf. Ripon, plaintiff, against the Alcazar Amusement Company, defendant, to recover damages for the breach of a contract whereby the plaintiff was engaged to perform for one week at the defendant's theater. From a judgment for plaintiff, defendant brings error.

Though the contract, consisting of a printed form filled in, was not signed by the plaintiff it was signed by the defendant, which also entered the engagement upon its books. On the date when the performances were to begin the plaintiff presented himself, but permission to perform was refused. Having been unable, after diligent search, to obtain an engagement elsewhere during the week specified in the contract, the plaintiff sued for the stipulated remuneration, for which he recovered judgment.

FRANK P. LEFFINGWELL, for plaintiff in error.

ADOLPH MARKS, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 4***—*what constitutes contract for services.* Where a writing signed by the defendant only, purporting to engage the services of the plaintiff to appear at the defendant's theater, is orally accepted by the plaintiff, and the defendant makes an entry on its books of the plaintiff's engagement, a valid contract, oral if not written, is entered into, on the breach whereof by the defendant, in refusing to allow the plaintiff to perform in accordance with the terms thereof, a suit will lie for the stipulated remuneration, such writing not being a mere proposal revocable by defendant and subject to cancellation before performance of such services.

2. **CONTRACTS, § 196***—*when printed portion of contract not controlling.* A written agreement consisting of a printed form, filled in and signed by the defendant, whereby he engages the services of the plaintiff for one week, reciting that a failure on the part of either party to perform on "such week" shall not be a violation of its terms, will, on the refusal of the defendant to accept performance, support an action by the plaintiff to recover the stipulated remuneration for such services on his tendering performance, it being evident that the printed form was designed to cover a case where the term of the engagement extends over a period longer than one week.

George E. Ford, Defendant in Error, v. M. Piowaty & Sons, Plaintiff in Error.

Gen. No. 21,112. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed January 11, 1916. Rehearing denied January 25, 1916.

Statement of the Case.

Action by George E. Ford, plaintiff, against M. Piowaty & Sons, a corporation, defendant, to recover

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ford v. M. Plowaty & Sons, 197 Ill. App. 417.

the purchase price of goods sold and delivered at the defendant's special instance and request. On judgment for plaintiff, defendant brings error.

SABATH, STAFFORD & SABATH, for plaintiff in error.

STEWART REED BROWN, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1470*—*when receipt of secondary evidence without laying proper foundation reversible error.* In an action for goods sold and delivered, held that the receipt of secondary evidence over objections thereto, without laying a proper foundation therefor was reversible error.

2. SALES, § 329*—*when evidence insufficient to sustain verdict.* In an action for goods sold and delivered, evidence which merely tends to show that a deal was made by the plaintiff with a party whom the plaintiff claims was an officer or agent of the defendant, supplemented by evidence of the contents of a check purporting to come from the defendant without adequate proof of notice to produce the original, and of a letter purporting to come from the defendant without adequate proof either that it came from or was authorized by the defendant, and of certain inclosures therewith that were incompetent without adequate proof of the letter itself, is insufficient to sustain a judgment for the plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frank Schoenfeld, Defendant in Error, v. Lake Shore & Michigan Southern Railway Company, Plaintiff in Error.

Gen. No. 21,141. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed. Opinion filed January 11, 1916.

Statement of the Case.

Action by Frank Schoenfeld, plaintiff, against the Lake Shore & Michigan Southern Railway Company, defendant, to recover the amount of fare paid on refusal of defendant to honor a ticket purchased by plaintiff. From a judgment for plaintiff, defendant brings error.

The plaintiff purchased from the defendant a round trip ticket over the defendant's line to a point on a connecting line. On refusal of the connecting line to honor the ticket the plaintiff was obliged to pay for his transportation over again, and to recover the amount so expended brings this action.

ROBERT J. CARY and BERTRAND WALKER, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 20*—*when presumed that connecting carrier acts as mere agent of initial carrier.* In the absence of evidence to the contrary, it is presumed that a railroad company selling a through

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Shafer, 197 Ill. App. 420.

ticket over its own and a connecting line merely acts as agent for such line, and is not liable in damages to the purchaser for the refusal of the connecting line to honor the ticket and transport the passenger in accordance therewith.

The People of the State of Illinois, Defendant in Error, v. Orrin J. Shafer, Plaintiff in Error.

Gen. No. 21,249. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed January 11, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois against Orrin J. Shafer for violation of section 10 of the Motor Vehicle Act (J. & A. ¶ 10,010). Having been convicted on trial before the court without a jury, the defendant brings error.

The principal issue of fact raised at the hearing was as to the speed at which the defendant was driving an automobile in a locality where speed in excess of fifteen miles an hour was by statute made prima facie evidence of its violation. After the single witness produced by the State had testified that the car was going at twenty-five miles per hour, and the defendant had testified that he was not driving faster than twelve miles an hour, that his car went about fifteen feet after he started to stop, and that he could stop it within that distance when running twelve miles an hour, the trial judge announced that it was unnecessary for him to hear any more evidence, that from his own experience

in driving a car he could not accept the defendant's testimony as to speed, and refused the request of the defendant's counsel to call other witnesses.

JONAS & HESS, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 34*—*when refusal to allow production of witnesses denial of justice.* To deny a defendant in a trial before the court his manifest right to produce witnesses to support his plea of not guilty is a palpable denial of justice.

2. TRIAL, § 286*—*when disregard of evidence by trial judge denial of justice.* For a judge to decide the issues before him on his private experience instead of on the evidence is a palpable denial of justice.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edward F. Dunne, Trustee, Appellee, v. Charlotte H. Cooke, Individually and as Executrix, et al., Appellants.

Gen. No. 19,881.

1. TRUSTS, § 111*—*what constitutes active trust*. Where a testamentary trustee is required to convey real estate to the beneficiaries upon the death of the testator's widow, and to convey to such beneficiaries at the expiration of such period certain corporate stock, subject to the charge in favor of the widow's annuity, the trust is an active one.

2. TRUSTS, § 200*—*when trustee may maintain action to construe will at expense of estate*. Where testamentary trustees are unable to agree with the beneficiaries as to the manner of the execution of the trust under a will and the amount of compensation for their services, they may, even though the will is free from ambiguity, maintain a suit in equity at the expense of the trust estate for a construction of the terms of the will and to recover compensation for their services.

3. TRUSTS, § 211*—*right of testamentary trustee to reasonable compensation for services*. A testamentary trustee having charge of an active trust is entitled to reasonable compensation for services rendered and reasonable expenses incurred as trustee.

4. TRUSTS, § 211*—*what may be considered in determining compensation of trustee*. The compensation of a testamentary trustee is not to be determined by any established practice or rule, but, in determining such compensation, the responsibility incurred, the amount of the estate, the time and labor properly devoted by the trustee to the discharge of his duties may be considered.

5. TRUSTS, § 212*—*when trustee has right to compensation although in receipt of compensation as executor*. The fact that a testamentary trustee having charge of an active trust has received compensation as executor does not deprive him, as sole surviving trustee, of his right to compensation for services rendered as trustee, provided the duties are separate.

6. TRUSTS, § 212*—*when testamentary trustee who is also executor right to charge fees in both capacities*. A testamentary trustee who has charge of an active trust and is also executor may not charge fees in both capacities for the same services.

7. TRUSTS, § 211*—*when good faith to be considered in determining compensation of testamentary trustee*. Where a testamentary

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

trustee of an active trust, who is also executor, acts in good faith in administering the trust, such conduct should be considered when determining the amount of compensation which he, as sole surviving trustee, is entitled to.

8. TRUSTS, § 211*—*what considered in awarding compensation to testamentary trustee.* In estimating the amount of compensation to be awarded a testamentary trustee, due consideration should be given to the intention of the testator to provide an annuity of a definite sum to his wife for life.

9. TRUSTS, § 211*—*what constitutes basis for estimation of compensation of testamentary trustee.* The amount awarded a testamentary trustee for his services in administering the trust estate should bear a reasonable relation to the value of the trust estate.

10. TRUSTS, § 211*—*what not considered in computing compensation of testamentary trustee.* The fact that the gross sales of a business during a testamentary trusteeship of seven years, the salaries paid to beneficiaries as officers, and the gross rental value of real estate constituted a very large sum should not be used as a basis for determining the amount of compensation to be awarded the trustee, where the trustee took no active part in the business or in shaping its policy, and took no part in the management of the real estate.

11. TRUSTS, § 218*—*when compensation allowed testamentary trustee excessive.* An allowance of \$33,000 to a testamentary trustee for fees for himself as trustee and his counsel together with costs, held disproportionate to the size of the estate, and excessive.

12. EVIDENCE, § 436*—*when hypothetical question misleading.* A hypothetical question relative to the value of services performed by a testamentary trustee and his counsel, held vague, indefinite and misleading where it assumed that the sales of the business were very large and that the estate was very valuable, and contained no reference to the rapidly diminishing income of the business, and all the witnesses wrongfully assumed that the trustee took an active part in the business and dominated its policy when, as a matter of fact, he had only nominal charge thereof.

13. EVIDENCE, § 454*—*when opinion evidence as to value of services of testamentary trustee of little weight.* The opinions of witnesses as to the value of services rendered by a testamentary trustee to the estate is of but little aid in determining the amount of compensation to be awarded for his services as trustee where their answers are based upon a hypothetical question which is vague and misleading.

14. TRUSTS, § 209*—*when attorney acting for testamentary trustee not entitled to compensation.* The duties of a testamentary trustee

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tee performed by an attorney for the trustee, which are not legal in their character, are not properly chargeable to the estate.

15. EQUITY, § 397*—*how fees of master in counties of third class fixed.* A master in chancery in a county of the third class cannot arbitrarily fix his fees for examining questions of law and reporting his conclusions, but before he is entitled to demand compensation, it is his duty to have the court determine the amount he should receive.

16. EQUITY, § 401*—*when stenographer's fees improperly taxed as costs by master.* A charge for stenographer's fees, which has already been included in the fee allowed the master in chancery, is not properly taxable as costs.

17. TRUSTS, § 200*—*when attorney's fees in action by testamentary trustee to construe will taxed against estate.* Attorney's fees in an action which is maintained in good faith by a testamentary trustee, because of disagreement with the beneficiaries, for a construction of the will as to the manner of executing the trust and to determine the amount to be allowed the trustee as compensation, should be taxed against the estate.

Appeal from the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded with directions. Opinion filed January 11, 1916. Rehearing denied January 25, 1916.

Statement by the Court. This case comes before this court on appeal from a decree of the Circuit Court of Cook county awarding the appellee the sum of \$30,000 as compensation for his services as trustee under the last will and testament of John S. Cooke, deceased, and those of his solicitors and counsel. Appellee was allowed \$15,000 for his services; William A. Doyle, one of appellee's counsel, \$12,000; and Joseph J. Thompson, as his solicitor in this proceeding, \$3,000; \$2,500 was allowed the master for his services, and \$500 allowed appellee for services of a stenographer.

More than seven years subsequent to testator's death, a bill was filed by the trustees to construe his last will and testament, particularly the fourth provision thereof, and to recover compensation for serv-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ices rendered as trustees under said will. John S. Cooke left him surviving Charlotte H. Cooke, his widow, Charles F. Cooke, George J. Cooke and John R. Cooke, his sons, and Irene Welch, his daughter, as his only heirs at law and next of kin. Both John R. Cooke and Irene Welch died during the pendency of the proceedings below. The death of John M. Smyth, one of the said trustees, was suggested of record November 17, 1909, and the cause proceeded in behalf of appellee, as sole surviving trustee. Appellee filed a supplemental bill April 21, 1911. The third and fourth provisions of the will are respectively:

“3rd: I hereby will and devise all my real estate of every description, including leasehold estates, to my friends John M. Smyth and Edward F. Dunne, in trust for the following uses and purposes, to-wit: to be held by them and the survivor of them, for the sole use and benefit of my beloved wife, Charlotte H. Cooke, during the time of her natural life, and after her death for the use and benefit of my beloved children, Charles F. Cooke, George J. Cooke, John R. Cooke and Irene Welch, share and share alike.

“During the life of my wife, I will and direct my trustees to permit my wife, or her authorized agent, to collect all rents and income of the same out of which she shall pay the current carrying charges on said real estate, such as taxes, interest on incumbrances, insurance and repairs.

“After the death of my wife, if my children can agree upon an equitable partition of the real estate, into four parts, and shall so declare to my trustees in writing and request a conveyance in accordance with said agreement, my said trustees, or the survivor of them, shall convey said property to my said children. If my said children cannot so agree upon a division of said property, then my said trustees, or the survivor of them, shall, after the death of my wife, convey to each one of my children requesting it an equal undivided one-fourth of said property.

“4th: I will and bequeath all the capital stock now

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owned by me in the Cooke Brewing Company and the Ara Glen Mineral Water Bottling Company to the hereinbefore mentioned trustees, Smyth and Dunne in trust for the following uses and purposes, to-wit: To secure to my wife a yearly income of seven thousand five hundred dollars during her natural life. If the net yearly income arising from my real estate and the sale of any of my personal property which I hereinbefore have bequeathed to her shall amount to said sum of seven thousand five hundred dollars each year, then the stock in said corporation shall not be charged with the payments of any annuity to my wife, but if during any year of my wife's life the income from my real estate and the sale of her personal property shall be insufficient to make up said amount of seven thousand five hundred, then it is my will that the deficiency shall be made good from the dividends on the stocks in said companies and shall be a charge upon said stocks until the same is paid.

"I will and direct that my trustees, or the survivor of them, hold said stock in said corporation for the term of seven years from my death, for the use and benefit of my beloved children, Chas. F. Cooke, George J. Cooke, and John R. Cooke and Irene Welch, subject to the charge in favor of my wife's annuity hereinbefore mentioned. And that during said period the management of said corporation, so far as my stock can control the same, shall be placed jointly in the hands of Charles F. Cooke, George J. Cooke and John R. Cooke.

"At the end of seven years my trustees are hereby directed to convey my stock in said companies, subject to charge in favor of my wife's annuity, to my said children, share and share alike.

"I hereby appoint my friends, John M. Smyth and Edward F. Dunne executors of this my last will and testament, without bond or surety."

The testator bequeathed to his wife all of his personal property, excepting his stock in the Cooke Brewing Company and the Ara Glen Company.

Issues were joined, on both the bill and supple-

mental bill. The case was referred, testimony taken, findings made by the master and decree entered by the court sustaining all of the master's findings except the seventh, the court finding in that regard that under the terms of the said will, the brewery stock must be held by the trustee until the death of the widow, Charlotte H. Cooke, to make up any deficiency that may accrue in the income from the real estate and to insure that \$7,500 per year shall be paid to the said widow as her annuity. The decree finds that the will was so ambiguous in its terms as to justify and require the filing of a bill for a construction thereof; that the quarrels of the family centered on the trustees, and they were obliged to institute this proceeding in order to secure a decree protecting them in their acts as trustees and in order to secure compensation for themselves and for their counsel; that the brewery was sold because of extravagant management and fatal family quarrels, and that the net proceeds, if any, of such sale, must be invested and held by the trustee to insure the payment of the widow's annuity. As to the real estate, the decree provides that the trust created by the will must continue until the death of the widow. The decree further provides that appellee, as the sole surviving trustee, be permitted to resign; that a new trustee be appointed, and that appellee recover from appellants the compensation above stated, and also the costs of this suit. The decree further finds that the last will and testament of John S. Cooke, deceased, was duly probated and letters testamentary issued to John M. Smyth and Edward F. Dunne, the executors named therein, who immediately entered upon their duties as such; that the estate was settled about seven years thereafter, the executors discharged, and, by order of the Probate Court, were paid the sum of \$6,000, as and for their fees as such executors; that the said stock has never been divided, but is still held intact

by the sole surviving trustee, Edward F. Dunne, the appellee; that as to the compensation to be awarded to the trustees, John M. Smyth in his lifetime and during the pendency of this suit, and his legal representative since his death, expressly waived any claim for compensation as trustee, upon the ground that Smyth was acting from motives of friendship for the deceased, and therefore the sole inquiry is as to what compensation should be paid to Edward F. Dunne, the sole surviving trustee. All of the material allegations of said bill of complaint, as amended, and of said supplemental bill of complaint are found to be true.

John S. Cooke died March 12, 1899, and the estate was closed and the executors discharged July 27, 1906. It is admitted that at the time of the final hearing before the master in 1912, the estate had much diminished in value, consisting almost wholly of the realty. All of the property of the brewery was sold December 8, 1910, the affairs of the corporation wound up, and its assets almost wholly applied to the payment of outstanding indebtedness. The construction of the fourth clause of the will is, therefore, unimportant, unless it becomes material to the question of compensation of appellee for services as trustee. It is contended by counsel for appellants, that there is no ambiguity in the will and that there was no necessity or justification for filing the bill in the present case, and that appellee is not entitled to further compensation. The fourth provision of the will provides that: "At the end of seven years my trustees are hereby directed to convey my stock in said companies, subject to the charge in favor of my wife's annuity, to my said children, share and share alike." Demand was made upon the trustees by the Cooke heirs, at the end of the seven-year period, to make such conveyance. The trustees refused such demand, maintaining that it was their duty to hold such stock during the life of Charlotte H. Cooke, to secure the payment of her annuity. It was

contended by counsel for the beneficiaries, and is contended here, that upon the closing of the estate, it was the duty of the trustees, the seven-year period having elapsed, to convey the stock to the children of the testator, and terminate the trust, except as to the real estate. The following letter was addressed to the attorney for the trustees, immediately prior to the filing of the bill in this case:

“November 30, 1906.

“Mr. William A. Doyle,
Chicago.

“Dear Sir:

“In regard to the Cooke matter, I spoke with Mr. John M. Smyth over the 'phone, and I saw Mayor Dunne personally, and they both gave me to understand that the entire matter is in your hands.

“The will, in my opinion, makes it the duty now of Mr. Smyth and Mayor Dunne, as trustees, to turn over to the children of Mr. Cooke all the stock in the Cooke Brewing Company and the Ara Glen Mineral Water Company, the seven years having more than elapsed since Mr. Cooke's death. Mrs. Cooke desires this to be done, and has signed and left with me a paper releasing Mr. Smyth and Mayor Dunne from any claim which she might have against them as trustees for turning the stock over. The Cooke Brewing Company has already received notice of the charge which will be on this stock in favor of Mrs. Cooke, and a memorandum of this notice has been noted in the stock book of the company.

“I take it from my conversation with you and Mayor Dunne that the trustees insist upon receiving fees for services as trustees before they turn the stock over, and that there may possibly be a disagreement between you and myself as to whether under the terms of the will it is the duty of the trustees to turn over the stock at this time.

“Mayor Dunne was kind enough in the interview which I had with him to say that he would be satisfied to leave the matter to you and myself, and that he would be satisfied to accept any sum as trustees' fees which we might agree upon.

"One difficulty with this is, that Mrs. Welch and Mr. John R. Cooke insist in their talks with me that the trustees are not entitled to any compensation as trustees, and that they have already been amply compensated for their services as Executors. When asked my opinion as an attorney in the matter I cannot lose sight of the decisions holding that trustees must act without compensation, and are not allowed compensation unless the document under which they are made trustees provides for compensation.

"In view of the stand which my clients take, I would have to decline the task of attempting to agree upon an amount with you. Although I would very much like to save annoyance for all parties concerned, still I believe that you and I would only waste time trying to negotiate a settlement between the parties. In the long run it would be better to have the matter submitted to some regularly constituted tribunal. To accomplish this, you might file a bill asking for a construction of the will, and have the questions of trustees' fees adjudicated. If you prefer not to file a bill, then of course I could file a bill on behalf of my clients, setting up that the time to turn over the stock has arrived and asking for a decree compelling the performance of the trust.

"This matter I understand has been dragging on now for several months without any conclusion being reached, and I am fully convinced that it is not to the interest of anybody to let it drag longer. If you will file such a bill as I suggest within the next week, I will be glad to enter the appearance of my clients and bring the matter to a speedy end. If you decide not to file the bill, then I shall feel free at the end of next week to file a bill on behalf of Mrs. Welch and Mr. John R. Cooke.

"Finally, I may say that I am convinced that the stock must be turned over without delay, and without compensation being allowed, or the bill in equity must be filed.

"While I regret very much to appear to bring a suit against either Mayor Dunne or Mr. Smyth, I feel,

none the less, that it is to the interest of all parties concerned to have this matter brought to a close.

Very truly,

(Signed) M. Henry Guerin."

George J. Cooke succeeded his father to the presidency of the Cooke Brewing Company March 1899, and continued as such president until February 24, 1904. Charles F. Cooke, a brother of George J. Cooke, and Irene Welch, his sister, in 1903, acquired a controlling interest in the company by the purchase of what was known as the Plamondon stock. Thereupon, on June 23, 1903, by action of the Board of Directors of the Cooke Brewing Company, the office of general manager was created; Charles F. Cooke was elected general manager, and George J. Cooke removed from the presidency of the corporation. For a brief interval, viz., February 6, 1904, to February 24, 1904, George J. Cooke again became president, when, on the latter date, Charles F. Cooke succeeded to the office of president and general manager of the brewery. George J. Cooke, at the same time, was elected vice-president of the brewery, without salary, and the evidence tends to show that he was not permitted to take any part in the management or conduct of the business, nor to thereafter enter the office of the company, or to see its books, except under the immediate protection of the court; he represented to the trustees that under the changed policy of the company, the business was diminishing and, if such policy was continued, would be ruined, and that it was their duty, under the fourth provision of the will, to place the management of the corporation, jointly, in the three sons of John S. Cooke, deceased. Charles F. Cooke continued as general manager and president until 1910, when the brewery was sold. The trustees at all times maintained that it was not for the best interests of all concerned that the trustees should do more than elect the children as directors in endeavoring to place the joint

management of the company with the sons. Owing to this difference of opinion as to the duties of the trustees, George J. Cooke, on June 9, 1904, filed a bill, making the trustees parties thereto, to construe that clause of the will which provides "that during said period (seven years) the management of said corporation (the brewery), so far as my stock can control the same, shall be placed jointly in the hands of Charles F. Cooke, George J. Cooke and John R. Cooke."

The evidence tends to show that the affairs of the brewery and the relations of the heirs were harmonious up to June 23, 1903. During 1903 the affairs of the Ara Glen Company were wound up and its outstanding indebtedness paid.

Neither the appellee nor John M. Smyth took any part in the active management of the brewery, either as executors or trustees. Appellee testified in this regard: "I never consulted with George Cooke, while he was president, in regard to the management of the business. * * * I did not assist in the manufacture * * * or the sale of the beer, and I know nothing of my own knowledge * * * about the receipts or the business transactions of the brewery." Under the clause of the will permitting the wife of the testator or her authorized agent to collect all rents and income of the real estate and to pay the current carrying charges thereon, including taxes, interest on incumbrances, insurance and repairs, the trustees did not collect any rents, nor make any repairs. Appellee testified: * * * "Under the will neither Mr. Smyth nor I collected any rents from the real estate. Of my own knowledge, I know nothing about the rents, to whom it was rented, or anything about it. It was attended to, under the provisions of the will by her (Mrs. Cooke's) agent." According to the testimony of Charles F. Cooke, the real estate was rented by the brewery, and the rents collected and paid by the brewery to Charlotte H. Cooke, the widow. The real

estate rented for about \$8,300 per annum, from which the brewery paid Charlotte H. Cooke \$7,500 per annum, and with the balance paid taxes and other necessary carrying charges. There was some evidence tending to show that the net proceeds of the rents were not at all times sufficient to pay the annuity. Charlotte H. Cooke testified that she received her annuity between the first and tenth of each month from her son Charles F. Cooke; that she never received any annuity from either appellee or John M. Smyth, but, following the death of her daughter Irene Welch, she once communicated by telephone with William A. Doyle (counsel for the trustees) regarding delay in payment of her annuity. The trustees had nothing to do with the declaring of dividends. The dividend checks were prepared and presented by the brewing company to the trustees for their indorsements, and then the trustees distributed such checks to the different heirs. George J. Cooke testified that at one time there was about \$34 deducted from each dividend check for the purpose of payment of his mother's annuity. William A. Doyle, as counsel for the trustees, testified that he prepared and took receipts from Charlotte H. Cooke for her annuity, examined accounts sent him by the brewery, checked dividend statements and that on one occasion he had considerable correspondence in regard to a deduction from the dividend check of George J. Cooke.

John S. Cooke was, at the time of his death, the owner of 1,498 shares of the capital stock of the brewery, of the par value of \$100 per share; the total capital stock being 2,000 shares; one share was owned by Charles F. Cooke and one share by George J. Cooke, and the remaining shares were known as the Plamondon interest. The stock of the brewery was the principal asset of the estate. At the time of the death of John S. Cooke, the capital stock of the brewery was \$200,000, and the total sales of the brewery were

54,000 barrels per year. In 1904, at the time George J. Cooke was finally removed as president and general manager, he testified that the book value of the entire capital stock was \$666,000, and that under his management \$157,000 in dividends were paid, and the annual sales of the brewery ranged between 72,000 and 75,000 barrels of beer. At the time the witness testified before the master in this proceeding, in 1908, the annual sales of the brewery had fallen to about 40,000 barrels. At the close of Charles F. Cooke's management, the brewery sold its entire plant and business for \$160,000. The indebtedness of the brewery at that time was \$130,000, in addition to which there was an indebtedness of \$22,000 secured by mortgage on other trust property.

During the administration of the affairs of the brewery under the management of Charles F. Cooke, the real estate was sold for nonpayment of taxes. Appellee communicated the situation to Charlotte H. Cooke and her attorney, threatening to remove Charles F. Cooke as real estate agent for Charlotte Cooke. On April 27, 1911, appellee filed a petition in the Circuit Court relative to the condition of the real estate; in pursuance to such petition an order was entered in this proceeding authorizing and directing appellee to collect the rents of the real estate, and to apply the same to its redemption from such tax sales, and authorizing him to borrow money on said real estate for such purpose. On May 13, 1911, appellee filed another petition representing that George J. Cooke had offered to collect the rents for the estate of John S. Cooke without charge or commission, and to mortgage one of the pieces of property for a sufficient amount to redeem all of the properties from impending tax sales; to deduct carrying charges from the rents, and turn the balance over to Charlotte H. Cooke, monthly. With the consent of appellee an order was thereupon entered, May 24, 1911, by the court approv-

ing the appointment of George J. Cooke for the aforesaid purposes.

At various times, legal proceedings, in which the estate of John S. Cooke, deceased, and the trustees were made parties, were instituted. Of the proceedings not concluded during the executorship, one was a suit of P. H. Welch, solely involving the heirs and devisees of his wife, Irene Welch. An answer was filed by the trustees and appellee testified he made an examination of the testimony taken before the master to safeguard the interests of Charlotte H. Cooke. In two of the remaining proceedings George J. Cooke was complainant, in one of which he asked for a construction of the provision of the will heretofore referred to, and in the second proceeding asked for the appointment of a receiver for the brewery and other relief. The latter bill was filed a short time following the appointment of William A. Doyle as counsel for the trustees. The fourth of these proceedings is the present suit.

There is a sharp conflict of evidence as to the extent, character and value of the services rendered by appellee and William A. Doyle, his counsel, which is the principal issue of fact in this case. Appellee testified that numerous conferences were necessitated with his cotrustee, and with various numbers of the Cooke family, including stockholders' and directors' meetings, because of personal differences existing between the children of the deceased, and that he thought there was not a week during which there was not a conference with either one of the heirs, or with his cotrustee, or their attorneys. George J. Cooke testified that the trustees did not attend any stockholders' meetings prior to 1904, which testimony is corroborated by the records of the brewery. The decree finds that the trustees did not, during this period, attend the corporate meetings, but sent their proxies to the stockholders' meetings with directions to elect the

three sons and Mrs. Irene Welch, the daughter, as four of the five directors of the company. Appellee further testified that the minority interests in the brewery, consisting of the Plamondons, were much dissatisfied, contending that the brewery was being conducted wholly in the interest of the Cooke family; that the salaries of the officers were too large, and that by reason of the alleged misconduct of one of the sons, John B. Cooke, for whom a conservator was subsequently appointed, it became necessary to remove him as a director. Appellee further testified that following the filing by George J. Cooke, of the two bills referred to, it became necessary to, and the trustees did, employ as counsel William A. Doyle, to look after the interests of the trust; that since the employment of Doyle, the latter has carried on all litigation. He further testified that the trustees always took care to ascertain whether or not the widow had received her annuity; that on certain occasions when dividend checks were received by the trustees, it became necessary for the latter to bring the heirs together to settle their disputes in that regard. Appellee further testified that, in addition to the matter of nonpayment of taxes, he received various communications and notices relative to the real estate and on August 11, 1910, was served with summons in a certain condemnation proceeding involving a strip of property belonging to the estate. Appellee further testified that because of the difficulties between the heirs, the trusteeship was very arduous, and, at times, very disagreeable. George J. Cooke testified that prior to June, 1903, he had no conferences with appellee; that subsequent thereto he had four conferences, three of which were not over fifteen minutes duration each. John R. Cooke, since deceased, testified that he had only two conferences with appellee and one of them was in regard to closing the estate in the Probate Court. Charlotte H. Cooke testified that the only time she consulted appellee was in

regard to her widow's award. Charles F. Cooke testified that he had quite a number of conferences with appellee in regard to the executorship, but he did not confer or advise with either of the trustees up to 1904, and that the other conferences with appellee were not more than two or three, which were had in regard to the trusteeship, between January 19, 1904, and February 24, 1904.

William A. Doyle testified that from the time that he was retained by the trustees as counsel, he was practically a "third trustee;" that he acted as counsel for the trustees and also as their representative; that the trustees were busy and could not give the trust their attention; he further testified that he was consulted in matters that were the duties of the trustees by everybody connected with the estate; that he was unable to state how many hours he spent in the discharge of his duties as counsel for the trustees in connection with litigation in which they were parties, since he was retained in April, 1904; that he did not keep a record of the actual time spent, but that altogether he gave two hundred days of his time, on the basis of five hours constituting a day's service. All of the heirs were represented by counsel and among the services testified to by Doyle, were frequent conferences with counsel for the respective parties. Doyle testified that he filed an answer to the first bill of George J. Cooke, and a cross-bill asking the court to fix and allow the trustees compensation for their services and sufficient money for the purpose of employing counsel; he testified that he attended all hearings before the master in such proceedings and examined 1,034 pages of testimony, but was unable to state the exact time spent before the master. Nothing was done regarding the cross-bill.

Several members of the Chicago bar, in answer to a hypothetical question setting forth appellee's contention as to services rendered, gave varying opinions

as to the usual, reasonable and customary compensation for such services, as assumed by the question to have been rendered by appellee, from \$30,000 to \$60,000, and the same witnesses' opinions as to the usual, reasonable and customary compensation for such services as was assumed to have been rendered by appellee's counsel, varied from \$15,000 to \$30,000. Other members of the Chicago bar, including one of the attorneys for the Chicago Title & Trust Company, upon a hypothetical question setting forth appellants' theory as to services rendered, testified that the usual, reasonable and customary fee for a trustee, for such services, would not exceed \$2,500; and that the usual and customary fee for services strictly legal in character, as assumed to have been rendered by appellee's counsel, would not exceed \$1,500. The final report of the executors filed in the Probate Court, in 1906, shows the personal property administered to have been of the value of \$212,185.93. Joseph J. Thompson was awarded \$3,000 by the chancellor as fees for his services rendered as solicitor in this case.

CHARLES GOODMAN, LEE J. FRANK, MARY LEE COLBERT and CHARLES H. PEASE, for appellants.

JOSEPH J. THOMPSON, for appellee.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

It is contended by counsel for appellants that the trust in this case is not an active trust, and that it was the duty of appellee, as sole surviving trustee of the estate of John S. Cooke, deceased, when the estate was closed, to terminate the trust, except as to the real estate. It is further contended by appellants' counsel that the will in question is free from ambiguity, and, therefore, the costs of this litigation should not be borne by the estate. It is also urged by appellants that

the compensation allowed appellee, as sole surviving trustee, for his services, that of his counsel, and costs, including master's fees, are clearly excessive; that the hypothetical questions as to trustee's and solicitor's fees are vague, indefinite, and not supported by the evidence; that the findings of the master and the decree of the court are contrary to the law and the evidence, and that for these reasons the decree of the Circuit Court should be reversed.

Where, as here, the trustee is required to convey the real estate to the beneficiaries on the happening of a certain event, viz., the death of testator's widow, and to convey to said beneficiaries, at the end of seven years, certain stock, subject to the charge in favor of the widow's annuity, the trust is not a passive or dry trust. * * * *Lawrence v. Lawrence*, 181 Ill. 248, 252. In this case the trustees distributed dividend checks, informed themselves as to the payment of the widow's annuity, requiring presentation of her receipts therefor, and performed other duties arising from a trust of this nature.

This court is of the opinion that the bill of complaint of appellee in this cause was not improvidently filed. There was a sharp conflict of opinion between the heirs and the trustees of the estate of John S. Cooke, deceased, in regard to the duties of the trustees under the fourth provision of the will. The trustees were informed in writing, by counsel for the beneficiaries, that if the trustees did not, within a week thereafter, file a bill seeking a construction of the will and for the determination of the question of compensation of the trustees by the court such bill would be filed by the beneficiaries. Six days thereafter, the present bill of complaint was filed by the trustees. In *Warner v. Mettler*, 260 Ill. 416, the court commencing at page 420 says:

“‘Wherever there is any bona fide doubt as to the true meaning and intent of the provisions of the in-

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strument creating the trust or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity at the expense of the trust estate and obtain a judicial construction of the instrument and directions as to his own conduct.' (3 Pomeroy's Eq. Jur. sec. 1064.) Courts of equity will not only compel the performance of the trust, but they 'will assist the trustees and protect them in the due performance of the trust whenever they seek the aid and direction of the court as to the establishment, *the management or the execution of it.*' (2 Story's Eq. Jur.—13th ed.—sec. 961.) *The difficulties arising in the execution of a trust may make it eminently proper for the trustee 'to apply to a court of equity for its aid and direction in the premises, and we have no doubt of the jurisdiction of a court of equity to afford the requisite relief.'*"

As the personal property of the estate has been disposed of, the construction of the will in regard thereto is not material to the issues in this case. Even though this court may be of the opinion that the will in question is free from ambiguity, yet, under the evidence, it is manifest that the trustees were unable to agree with the beneficiaries as to the proper construction of the will and, under all the facts and circumstances in evidence, they were justified in seeking the intervention of a court of equity for that purpose.

Appellee is entitled to reasonable compensation for services rendered and reasonable expenses incurred as trustee. *Dean v. Northern Trust Company*, 266 Ill. 205, 211. This court has held that: "The compensation of a trustee is not determined by any established practice or rule, but in determining such compensation the responsibility incurred, the amount of the estate, the time and labor properly devoted by the trustee to the discharge of his duties are to be considered. What is reasonable compensation depends largely on the circumstances of each case." *Follans-*

bee v. Outhet, 182 Ill. App. 213, 216. The fact that appellee received compensation as executor does not deprive him, as sole surviving trustee, of his right to compensation for services rendered as trustee, provided the duties were separate. An executorial trustee may not, however, charge fees in both capacities for the same service. *Arnold v. Alden*, 173 Ill. 229, 234.

The Probate Court fixed the compensation of the executors in this case at the sum of \$6,000; they were paid the additional sum of \$800 as interest thereon. The Circuit Court by its findings did not separate nor distinguish the services of appellee rendered as executor from those rendered as trustee, although the decree finds that by order of the Probate Court the trustees were paid their fees as such executors. The court finds that considerable time was spent by the trustees in regard to a bill filed by the Plamondons involving more than \$30,000. The suit referred to was settled by the executors and referred to in their first report filed in the Probate Court. During the period of the executorship the services performed by the trustees, as such, until June, 1903, when the management of the brewery was taken from George J. Cooke, mainly consisted of the distribution of dividends, ascertainment of receipt by the widow, Charlotte H. Cooke, of her annuity, attending a family conference determinative of a choice between George J. Cooke and Charles F. Cooke for president of the brewing company, attending certain meetings of the stockholders thereof, either in person or by proxy, and holding title to the real estate. Under the third provision of the will, the trustees were directed to, and did, permit the wife of the testator, or her authorized agent, to collect all rents and income of the real estate and to pay the current carrying charges thereon.

Dissensions among the Cooke heirs, covering a period of years, assuming serious form in June, 1903, imposed, thereafter, duties more pressing and onerous

upon the trustees. That the trustees earnestly endeavored, though unsuccessfully, to harmonize the differences which had arisen between the sons of the testator is manifest from the evidence. These efforts of the trustees included many conferences with the heirs, their counsel, and with each other. After the real estate had been sold for taxes, appellee, as sole surviving trustee, took prompt and effective measures to protect the property affected. The litigation between the heirs, instituted by George J. Cooke, to which the trustees were made parties, and other litigation and court proceedings, including the matter of the conservatorship of John R. Cooke, required the attention, to some extent, of the trustees. The constant attendance of trustees' counsel at the several hearings before the master in the proceeding wherein George J. Cooke sought a construction of the will as to the duties of the trustees, was justifiable, even though the several parties were represented by counsel. The trustees were necessary parties to the proceeding and had the right, therefore, to be represented by counsel. It is evident that the trustees in administering the trust acted in good faith, and the question of compensation of appellee, as sole surviving trustee, for services rendered in behalf of the trust should be determined upon that basis. Appellee did not, however, render services to the extent set forth in the long series of findings, in the decree entered by the Circuit Court. The findings of the court that the gross sales of the brewery during the trusteeship were \$3,000,000, salaries paid to the children amounting to \$175,000, and the gross rental value of the real estate \$90,000, though relevant for the purpose of showing the size and character of the trust property, should not be used as a basis or as a determining factor, in arriving at the value of the services of appellee, as trustee. The trustees took no part in the actual management of the brewery, in the selection or management of its em-

ployees, nor in influencing its policy, and took no part in the management of the real estate, the title to which was vested in the trustees. In 1904 the book value of the 1,498 shares of stock held in trust by the trustees was about \$500,000. Six years later the complete change in the fortunes of the business is shown in the fact that the entire plant and business of the Cooke Brewing Company was sold for \$160,000, less than three-fourths of which proceeds belonged to the trust estate and which was practically all absorbed by outstanding indebtedness of the company. The court by its decree finds that the real estate left by John S. Cooke was worth (presumably at the time of his death) more than \$150,000. The only evidence as to the value of the real estate at the time of the entry of the decree is that of George J. Cooke, who testified that the real estate exclusive of the brewery plant was worth approximately \$65,000 to \$75,000. The personal property belonging to the trust has been practically exhausted. An allowance of \$33,000 for the fees of appellee and his counsel, together with costs, including master's fees, is a sum disproportionate to the apparent value of the trust estate at the time of the entry of the decree, regarding the value of which the court below makes no finding. In arriving at an equitable conclusion as to the question of compensation, the amount fixed should bear a reasonable relation to the value of the trust estate. Due consideration must be given to the rights and interests of the widow, to whom the testator willed an annuity of \$7,500 per annum, during her life. The intention of the testator should not be defeated if it can reasonably be complied with.

The hypothetical question asked appellee's witnesses assumed that the sales of the product of the brewery during the trusteeship were over \$3,000,000, the assets of the Cooke Brewing Company about \$600,000, and that the estimated value of the total estate including income was \$4,000,000. The hypothetical question

contains no reference to the rapidly diminishing income of the business, commencing in 1904. It is obvious that such assumption must have produced in the minds of the various witnesses the erroneous impression that the trust estate was of great magnitude. The annual sales of the brewery, according to the testimony of George J. Cooke, were about 72,000 barrels in 1904, and in 1908 the annual sales had fallen to about 40,000 barrels. All of these witnesses assumed that the trustees took an active part in the management of the business, or, by the election of the directors, largely dominated its business policy. It is manifest that such hypotheses were misleading, and the opinions expressed by the various witnesses as to the value of the services rendered can be of but little aid to the court. This is further emphasized by the fact that the recitals as to the services of appellee and his counsel, contained in such hypothetical questions, were, in many instances, vague, indefinite and uncertain.

The testimony of appellee's counsel, is, that he was "practically a third trustee; was consulted, considered and run to, in matters that were the duties of the trustee, by everyone connected therewith." In regard to the legal services rendered by appellee's counsel, the evidence tends to show that he was present at all hearings and arguments in the proceedings instituted by George J. Cooke; that he examined all pleadings and filed answers in all cases for the trustees; that he attended practically all of the hearings and arguments of counsel before the master and advised the trustees of such hearings and the evidence heard; that he had numerous conferences with the several lawyers employed by the heirs, reported such conferences and matters relating thereto, to the trustees, and advised with them regarding same; that he attended to all other litigation in which the trustees were parties, or the interests of the beneficiaries involved. The services of William A. Doyle extended over a period of

four years. The evidence tends to show that he, as counsel for the trustees, actively and faithfully discharged his duties as such. The duties of trustee, however, performed by Mr. Doyle, which were not legal in their character, are not properly chargeable to the estate.

It is further contended, by counsel for appellants, that the fees of the master in chancery are excessive. The fee requested by the master, as shown by his certificate and allowed by the court, was \$2,500. How such sum is arrived at cannot be determined from an inspection of the master's certificate. A master in a county of the third class cannot arbitrarily fix his fees for examining questions of law and fact and reporting his conclusions thereon, but before he is entitled to demand compensation it is his duty to have the court determine the amount he should receive, and the parties may be heard upon that question. *Schnadt v. Davis*, 185 Ill. 476. Further evidence should be heard to determine the extent and value of the master's services, and as to the reasonableness of his fee.

It is also urged that the court erred in taxing, as costs in the case, the sum of \$500 for stenographer's fees, as such item was included in the fee allowed the master. Such allowance is clearly erroneous. *Schnadt v. Davis, supra*.

It is further contended that the court erred in taxing against the estate the solicitor fees allowed to Joseph J. Thompson, as solicitor for appellee in this proceeding, and that such fee should be paid by the appellee. The costs of this litigation should be borne by the estate. *Arnold v. Alden, supra*.

The decree of the Circuit Court is reversed and the case remanded for such proceedings as equity and justice may require, consistent with the views herein expressed.

Reversed and remanded with directions.

Hartray v. City of Chicago, 197 Ill. App. 446.

**William C. Hartray, Administrator, Appellee, v. City
of Chicago, Appellant.**

Gen. No. 20,858. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 11, 1916.

Statement of the Case.

Action by the administrator of the estate of Thomas M. Smith, deceased, plaintiff, against the City of Chicago, defendant, for damages for the death of intestate alleged to have been caused by the negligence of defendant. From a judgment in favor of plaintiff for \$8,500, defendant appeals.

This case was before this court at a former term on an appeal prosecuted by the defendant from a judgment in favor of plaintiff, reported in 182 Ill. App. 134, reversing the judgment because of error in improperly admitting testimony of the existence of a particular defect in the street pavement of Elston avenue, in the City of Chicago, which did not contribute to the injury of plaintiff's intestate, and on the further ground that the evidence did not sufficiently prove that the defendant, the City of Chicago, had notice either of the existence of a certain other defect, if any existed in said street, or of its dangerous condition, if it was dangerous, which contributed to the injury and death of plaintiff's intestate.

The deceased, at the time in question, was driving in a southerly direction on Elston avenue, in the City of Chicago, a four-mule team with a heavy wagon attached thereto. There were three witnesses to the accident, all of whom testified in behalf of the plaintiff. Their evidence tended to show that the accident oc-

curred in the nighttime, and that as the mules reached the south cross-walk of Armitage avenue, where the latter street intersects Elston avenue, the right front wheel of the wagon in question dropped into a deep hole in the pavement in Elston avenue, at a point south of the center line of Armitage avenue, causing the deceased to fall from his seat on the wagon to the street pavement, sustaining injuries which resulted in his death.

Fred Tiedge and Stanley Feist, two of the witnesses to the accident, did not testify at the first trial, but testified at the second and third trials of this case. Their testimony at the last hearing, as to the location of the hole in question, was that the right front wheel of the wagon dropped into a hole on the *outside* of and immediately adjoining the *west* rail of the southbound street car track on Elston avenue, which testimony, in that regard, was at variance with the testimony of Mary Becker. Fred Tiedge and Stanley Feist testified that the wagon went into a hole in front of Paylor's saloon. Tiedge testified that, "The man fell off to the Paylor way * * *." The entrance to the Paylor saloon was on the southwest corner of Armitage and Elston avenues. Mary Becker testified that, "The hole was right in front of Paylor's saloon * * * *inside* of the southbound track * * *." He fell right *straight in the front, mostly toward Paylor's saloon.* * * * He laid in the middle of the southbound track." Stanley Feist did not testify as to the direction in which the body of the deceased fell. Five other of plaintiff's witnesses corroborated the testimony of Tiedge and Feist as to the location of the hole in question, and that such condition had existed there during all of that winter. On the other hand, several other witnesses testified, in behalf of the city, that there was no hole at the place in question of the size and character testified to by plaintiff's witnesses.

Hartray v. City of Chicago, 197 Ill. App. 446.

JOHN W. BECKWITH, N. L. PIOTROWSKI, RICHARD S. FOLSOM and CHARLES R. FRANCIS, for appellant; DAVID R. LEVY, of counsel.

C. HELMER JOHNSON and DANIEL BELASCO, for appellee.

MR. JUSTICE MCGOERTY delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 257*—*what is effect of variance in testimony.* Variance in the testimony of witnesses as to the exact location of an accident goes simply to their credibility.

2. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to sustain verdict in action for negligent death.* In an action against a city for the death of a person caused by the wheel of a wagon in which he was sitting falling into a hole in the pavement and throwing him upon the pavement, *held* that the verdict was not against the manifest weight of evidence.

3. APPEAL AND ERROR, § 1185*—*what is extent of review of evidence by Appellate Court.* The Appellate Court must review a case from the record presented, and cannot inspect the transcript in a former hearing to determine questions of fact.

4. WITNESSES, § 342*—*when admissibility of evidence as to location of hole in pavement not affected by variant testimony.* The fact that the sole witness at the first trial of a case against a city for damages, for the death of a person caused by the wheel of the wagon in which deceased was sitting, falling into a hole in the pavement and throwing him out, testified that the hole was at a certain place, does not render inadmissible at a subsequent trial the testimony of other witnesses that the hole was at another place.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Benjamin M. Lawrence, Appellee, v. Northwestern
National Insurance Company, Appellant.**

Gen. No. 20,877. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 11, 1916. Rehearing denied February 7, 1916.

Statement of the Case.

Action by Benjamin M. Lawrence, plaintiff, against the Northwestern National Insurance Company, defendant, on a fire insurance policy for \$3,000 on a two-story frame dwelling. From a judgment for plaintiff for \$1,500, defendant appeals.

Plaintiff filed sworn proofs of loss with defendant, alleging the amount of the loss to be \$2,492.20, which is the amount set forth in plaintiff's statement of claim. Defendant, in its affidavit of merits, confined the issues to acts and deeds which occurred after the fire, and predicated its defense upon fraud and false swearing in making the representations, and expressing the opinions appearing in the proofs of loss.

The policy of insurance contained this language: "This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." The policy required the insured to deliver the following instruments to the company:

- a. Complete inventory, stating the quantity and cost of each article and the amount claimed thereon,
- b. Sworn statement setting forth the cash value of each item and the amount of loss; and,
- c. If requested, verified plans and specifications of the building, fixtures or machinery destroyed or damaged.

Lawrence v. Northwestern National Ins. Co., 197 Ill. App. 449.

Plaintiff's proof of loss included a plan certified by him, showing a *two-story and basement* frame building and a statement and schedule containing a list of material sufficient to erect a building of such dimensions with studding twenty-four feet high, including a maple floor covering the entire first floor thereof, birch doors with plate glass, and oak trim in the living and dining rooms, respectively. Defendant contended that the building destroyed by fire was *one* story in height with an *eighteen foot* studding only, containing no hard wood trim nor birch doors with plate glass, and only the kitchen floor was of maple. Defendant further contended that much of the lumber used was old and secondhand, and the prices of material contained in such statement of loss are excessive. The plan and specifications included in the proofs of loss were made by a building contractor named O'Donovan, at the request of and upon information given to him by plaintiff, who certified that such plan and specifications were true and correct to the best of his knowledge and memory.

There was a conflict of evidence upon all of the issues of fact raised by the pleadings. One of defendant's witnesses, Salomon, a building contractor, testified that the lumber prices seemed to be fair. The witnesses, in estimating the loss, gave opinions varying from \$1,324 to \$3,100, respectively.

FRANK M. FAIRFIELD, for appellant.

S. E. LAMBERT, for appellee.

MR. JUSTICE McGOERTY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 683*—*when question whether overvaluation in proofs of loss fraudulent for jury.* It is a question of fact whether

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Illinois Smelting & Refining Co. v. Horton et al., 197 Ill. App. 451.

an overvaluation in the proofs of loss by fire of property is intentionally fraudulent, even though there is a considerable discrepancy between the amount stated by the insured in the proofs of loss and the value found by the jury.

2. FRAUD, § 87*—*when not presumed*. Fraud is never presumed.

3. FRAUD, § 89*—*when burden of proof upon party alleging fraud*. The burden of establishing fraud is upon the party alleging it.

4. INSURANCE, § 633*—*when evidence insufficient to establish fraudulent overvaluation*. In an action on a fire insurance policy on a building, evidence held insufficient to establish fraud in making an overvaluation in the proofs of loss.

Illinois Smelting & Refining Company, Defendant in Error, v. Harold E. Horton and George H. Horton, trading as Chicago Aluminum Castings Company, Plaintiffs in Error.

Gen. No. 20,472. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed January 17, 1916.

Statement of the Case.

Action by the Illinois Smelting & Refining Company, plaintiff, against Harold E. Horton and George H. Horton, trading as Chicago Aluminum Castings Company, defendants, for a balance claimed to be due for aluminum sold defendants. From a judgment for plaintiff, defendants bring error.

HARVEY STRICKLER, for plaintiffs in error.

LOUIS S. GIBSON, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

New Amsterdam Casualty Co. v. Hetterstrom, 197 Ill. App. 452.

Abstract of the Decision.

1. ACCORD AND SATISFACTION, § 4*—*what constitutes where claim disputed.* Where there is a dispute as to the weight of metal sold and the parties agree that the seller shall weigh up the metal and that the purchaser shall make payment at once on the basis of the weight thus ascertained, and, after the metal is correctly weighed, a bill is presented in which a shortage of weight is deducted, and a check given in payment therefor is accepted, there is an accord and satisfaction so as to preclude a recovery for an alleged balance.

2. PAYMENT, § 29*—*when evidence sufficient to establish payment of disputed claim.* In an action to recover an alleged balance for metal sold where it appeared that there was a dispute as to the weight, and there was undisputed evidence that the plaintiff carefully weighed and checked the metal, pursuant to an agreement of the parties, *held* that the evidence was sufficient to establish payment for all metal that had been delivered.

**New Amsterdam Casualty Company, Plaintiff in Error,
v. W. B. Hetterstrom et al., Defendants in Error.**

Gen. No. 21,156.

1. INSURANCE, § 155*—*when additional premium recoverable by employer's indemnity insurance company.* Where an employer's indemnity insurance policy provides that the premium is based upon the entire compensation paid the employees, and that if such entire compensation exceeds the estimate the assured shall, upon demand, immediately pay the insurer the additional premium earned, the insured is liable for the additional premium, upon demand, where the compensation has been grossly underestimated in the schedule.

2. INSURANCE, § 113*—*when evidence sufficient to establish delivery of policy.* In an action by an employers' indemnity insurance company for an additional premium upon the ground of an underestimate of compensation paid employees in the schedule, evidence *held* sufficient to establish a delivery of the policy.

3. INSURANCE, § 661*—*when evidence sufficient to establish acceptance of policy.* In an action by an employers' indemnity in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

New Amsterdam Casualty Co. v. Hetterstrom, 197 Ill. App. 452.

insurance company for an additional premium upon the ground of an underestimate of compensation paid employees in the schedule, *held* that the payment of the initial premium was sufficient evidence of the acceptance of the policy.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and judgment here. Opinion filed January 17, 1916.

BULKLEY, MORE & TALLMADGE, for plaintiff in error.

C. D. LEE, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff sued defendants for premiums on a policy of indemnity insurance. After trial by the court it was adjudged that plaintiff take nothing.

By the policy the plaintiff agreed to indemnify the assured for damages on account of bodily injuries sustained by individuals not employed by defendant. The work covered by the policy was a paving and curbing job at Forest Park, Illinois. The basis of the premium was \$1.50 for each \$100 of the assured's pay roll on that work, with a minimum premium of \$50 which was charged at the time the policy was written. The policy contained a clause, which is usual in such form of policy, as follows:

"The premium is based on the entire compensation of which an estimate is given in the schedule. If such entire compensation exceeds the said estimate the assured shall on demand immediately pay the Company the additional premium earned."

The pay roll was estimated in the schedule at \$3,000, but upon examination of defendants' books it was ascertained that the pay roll was \$30,522.13, and upon the basis of this, the premium which defendants should pay would be \$457.83, upon which defendants were entitled to a credit of \$50, the initial premium which they had paid. Under the undisputed evidence and

Broxham v. Harrington, 197 Ill. App. 454.

under the terms of the policy defendants were obligated to plaintiff for premiums in the amount of \$407.83. *New Amsterdam Casualty Co. v. Saloman*, 165 Ill. App. 264; see also *Employers' Liability Assur. Corporation v. Kelly-Atkinson Construction Co.*, 195 Ill. App. 620.

It is argued by the defendants in this court that the policy was not delivered to defendants and accepted by them, but we think the evidence does not justify this assertion. The evidence sufficiently shows a delivery, and the payment thereafter of the initial premium of \$50 is evidence of the policy's acceptance.

The plaintiff was entitled to \$407.83. The judgment of the trial court is reversed and judgment against defendants for this amount is entered in this court.

Reversed and judgment here.

John D. Broxham, Plaintiff in Error, v. James J. Harrington, Jr., Defendant in Error.

Gen. No. 21,277. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action for deceit by John D. Broxham, plaintiff, against James J. Harrington, Jr., defendant, to recover money expended by the plaintiff in redeeming from a sale of property for an unpaid special assessment which the plaintiff claimed the defendant, the plaintiff's grantor of the property, represented as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

having been paid. On judgment for the defendant, the plaintiff brings error.

It appeared that plaintiff and defendant, each owning certain lots, agreed to make an exchange; that on August 25, 1913, they met at the office of defendant to close the deal; that defendant produced an opinion of title from the Chicago Title & Trust Company showing that his property was subject to a special assessment for street paving, confirmed February 29, 1912, payable in five annual instalments. Plaintiff testified that defendant said that the former owner of his lots had paid the first instalment of the special assessment, and that defendant would get the receipt from him and turn it over to plaintiff. There was evidence tending to corroborate plaintiff. On the other hand, defendant denied making such statement, and there was testimony tending to corroborate him. The deal was closed, defendant giving plaintiff a warranty deed of that date conveying the property to plaintiff, "subject to all taxes and assessments levied for the year 1912 and to any unpaid special taxes or special assessments." Plaintiff claimed that as a matter of fact this first instalment of the special assessment had not been paid, and that after he acquired title the property was sold therefor and he was obliged to and did deposit with the county clerk \$116.67, the amount necessary to redeem from this sale. Plaintiff claimed that by defendant's false representation, knowingly made, he induced plaintiff to act upon it to his loss and injury.

RATHJE, LAWLOB & CONNOR, for plaintiff in error.

WILLIAM A. JENNINGS, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Pouzar v. Old Colony Trust & Savings Bank, 197 Ill. App. 456.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1752***—*when judgment affirmed for insufficiency of abstract.* Where, on review of a judgment on a writ of error, papers and documents, received in evidence in the trial court and referred to in the plaintiff in error's brief and argument as being insufficient to support the judgment, do not appear in the abstract of record either in whole or in part, or in substance, the court will not search the record to find grounds for reversal, but judgment may properly be affirmed on the ground that it will be presumed that they were sufficient to support the conclusion reached by the trial court.

2. **FRAUD, § 115***—*when evidence insufficient to sustain judgment.* In an action for deceit to recover money expended by the plaintiff in redeeming from a sale of property for an unpaid special assessment which the plaintiff claimed the defendant-grantor represented as having been paid, evidence held insufficient to support a judgment for the plaintiff.

3. **CONTRACTS, § 256***—*when previous negotiations merged in written contract.* A written contract executed between parties supersedes all prior negotiations, representations and agreements upon the subject.

John V. Pouzar, Plaintiff in Error, v. Old Colony Trust & Savings Bank, Defendant in Error.

Gen. No. 21,357.

BANKS AND BANKING, § 131*—*what is effect of certifying forged check on liability of bank.* A bank certifying a check at the instance of a bona fide holder for value will not be relieved of liability thereon by the fact that the signature of the drawer is a forgery.

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed January 17, 1916.

W. J. VAVRA and G. L. WIRE, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pousar v. Old Colony Trust & Savings Bank, 197 Ill. App. 456.

DEERES, BUCKINGHAM & EATON, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit against defendant to recover the amount of a check for \$45 drawn on defendant's bank and certified by it but which it later refused to pay. Upon trial by the court it was adjudged that plaintiff take nothing.

We have not been favored with any brief on behalf of the defendant.

From the evidence it appears that the plaintiff, who was a merchant, on Saturday evening, November 1, 1913, sold a suit of clothes to H. L. Davis, known by the plaintiff to be an employee of the McKenzie Furnace Company; that Davis tendered in payment a check dated that day, payable to his order, in the sum of \$45, signed by the McKenzie Furnace Company, by D. J. McKenzie, president. Davis indorsed the check in blank and delivered it to plaintiff, and received the suit of clothes and \$25 in change. On Monday, November 3rd, plaintiff, at the opening of business, presented the check at the banking rooms of the defendant and requested that it be certified. Defendant certified the check and plaintiff then deposited it to his account with the National City Bank of Chicago. Later, but on the same day, defendant through S. B. Cramer, its assistant cashier, notified the National City Bank and the plaintiff that the signature of the maker of the check was a forgery. On the same day, November 3rd, the check was paid through the Chicago Clearing House, through which both the National City Bank and the defendant clear. On November 4th, Mr. Cramer returned this check to Mr. Meyer, assistant cashier of the National City Bank, and requested Mr. Meyer to charge the check back to plaintiff because their "fool" teller had certified a forged signature,

Pouzar v. Old Colony Trust & Savings Bank, 197 Ill. App. 456.

and promised to take up the check if plaintiff would not accept the charge back. Mr. Meyer remitted to Mr. Cramer the amount of the check and said that he would take the matter up with plaintiff in an endeavor to have the check charged back to him. Subsequently the check was presented at the defendant's bank to the assistant cashier, who refused to pay the same. The National City Bank charged the amount of the check back to plaintiff.

Under these facts we are of the opinion that plaintiff was entitled to recover.

The provisions of the Negotiable Instruments Act apply to a check. Illinois Statutes (Hurd) chapter 98, Section 202. (J. & A. ¶ 7824.) "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." Section 204. (J. & A. ¶ 7826.) "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." Section 205. (J. & A. ¶ 7827.) "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Section 206. (J. & A. ¶ 7828.) *Rauch v. Bankers National Bank*, 143 Ill. App. 625.

There was no competent evidence that the signature on the check was a forgery, and further, as was said in *First National Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 306: "The drawee of a bill of exchange or of a bank check is conclusively presumed to know the signature of the drawer, and if he accepts or pays, in the usual course of business, a bill or check whereon the signature of the drawer is a forgery, he will be estopped to afterward deny the genuineness of such signature."

For the reasons above indicated the judgment is reversed and judgment for plaintiff against defendant for \$45 is entered in this court.

Reversed and judgment here.

Herbert F. Brandenberg, Defendant in Error, v. Peter Klehr, Plaintiff in Error.**Gen. No. 21,486. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOHN C. WORK, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action by Herbert F. Brandenberg, plaintiff, against Peter Klehr, defendant, in the Municipal Court of Chicago, to recover for personal injuries sustained by plaintiff in a collision between plaintiff's motorcycle and defendant's automobile. The case was tried by the court without a jury. To reverse a judgment for plaintiff for four hundred and fifty dollars, defendant prosecutes this writ of error.

WALTER A. BRENDENCKE, for plaintiff in error.

SCHNAEKENBERG & RUBINKAM, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when evidence sufficient to sustain finding of lack of contributory negligence.* In an action to recover for personal injuries sustained by plaintiff in a collision between his motorcycle and defendant's automobile, evidence examined and held to warrant a finding that plaintiff was not guilty of negligence contributing to his injury, it appearing that at the time of the accident plaintiff was riding on the right side of the road.

2. AUTOMOBILES AND GARAGES, § 3*—*when evidence sufficient to sustain finding of negligence in operation of automobile.* In an action to recover for personal injuries sustained in a collision be-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chicago Specialty Shoe Co. v. Uhwat, 197 Ill. App. 460.

tween plaintiff's motorcycle and defendant's automobile, evidence examined and held sufficient to warrant a finding that defendant was guilty of negligence, it appearing that while plaintiff was riding on his right-hand side of the road, defendant improperly crossed from his right-hand side to his left, causing the collision.

Chicago Specialty Shoe Company for use of Stein & Rosenthal, Defendant in Error, v. Walter Uhwat, Plaintiff in error.

Gen. No. 21,536.

FRAUDULENT CONVEYANCES, § 15*—*when creditor of vendor of goods in bulk cannot recover personal judgment against vendee.* The creditor of a vendor of goods in bulk cannot recover a personal judgment against the vendee because of the mere failure of such vendee to comply with the Bulk Sales Act, providing that such sale shall be void as against the creditors of such vendor unless the vendee gives certain notice to such creditors.

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed January 17, 1916.

J. J. MOSER, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

By this writ of error defendant seeks to have reversed a judgment rendered against him in the Municipal Court for \$11.41.

Plaintiff in its statement of claim alleges that on December 7, 1914, one F. Wanotowicz owed plaintiff \$11.41 for merchandise sold to him; that on January

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

4, 1915, said Wanotowicz sold his stock of merchandise to the defendant in bulk, said merchandise being valued at \$500; that the "said parties in violation of the statutes of the State of Illinois, in force and effect on said date, did not notify the plaintiff, as is provided in said statute known as the 'Bulk Sales Act,' whereby defendant became liable to pay the claim of plaintiff." Defendant says that this claim does not state any cause of action, and in this we think defendant is correct. The "Bulk Sales Act," in brief, provides that the sale of a stock of merchandise "shall be fraudulent and void as against the creditors of the said vendor" unless the vendee shall at least five days before taking possession give written notice to creditors of the vendor of the proposed purchase and the terms of the sale. There is also a further provision therein that any vendor violating the obligations laid upon him to furnish to the vendee a list of the creditors shall be guilty of a misdemeanor and punished. We nowhere find any provision for any liability of the vendee to a vendor's creditor arising from any violation of this act. We hold that a creditor cannot recover a personal judgment against a vendee because of the latter's failure to comply with this act.

We have not been favored with any brief on behalf of the plaintiff.

In *Bewley v. Sims* (Court of Civil Appeals of Texas, application for writ of error dismissed by the Supreme Court), reported in 145 S. W. Rep. 1076, the court seems to have considered the decisions of other States having bulk sales acts similar to ours, and says: "In none of the states, so far as we have been able to find, has it been held that a mere purchase in bulk, as here, in violation of the statute, renders the vendee personally liable to the creditors of the vendor." This is in accord with the conclusion of the Supreme Court of New Hampshire in *McGreenery v. Murphy*, 76 N. H. 338. In *Dobson v. More*, 171 Ill. 271, it was held that

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a creditor for goods sold to a partnership which became incorporated after the purchase, who levies an attachment on the corporate property, claiming it was transferred from the partnership to hinder creditors, must show to sustain the levy that the property attached was the same property transferred from the partnership and that the transfer was fraudulent.

For the reasons above indicated we are of the opinion that there is no liability of the defendant. Hence the judgment is reversed and judgment of *nil capiat* is entered in this court.

Reversed and judgment here.

Johanna Gertz, Defendant in Error, v. Clover Leaf Casualty Company, Plaintiff in Error.

Gen. No. 21,581. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARNOLD HEAP, Judge, presiding. Heard in this court at the October term, 1915. Reversed. Opinion filed January 17, 1916.

Statement of the Case.

Action by Johanna Gertz, plaintiff, against the Clover Leaf Casualty Company, defendant, in the Municipal Court of Chicago, to recover on a policy of insurance. To reverse a judgment for plaintiff for \$1,000, defendant prosecutes this writ of error.

The policy sued on was issued by a company which was succeeded by defendant, and was a health and accident policy, and plaintiff, the wife of insured, was named as beneficiary. The amount of the judgment was payable in case of death caused by accident.

It appeared that while loading coal some lumps fell, striking Gertz on the feet or legs. At the time he gave no exclamation or indication of injury, but continued

working, and neither then nor while delivering the coal or going home did Gertz mention coal falling on him. Witness was working on the opposite side of the wagon. The physician testified that the cause of death was diabetes mellitus, accompanied by a gangrenous condition of the foot incident to diabetic ulcer. It was amply proved that the insured had suffered for a long time from diabetes, and that for several years before his death had a diabetic ulcer of the foot, the ulcer being two inches broad and an inch long, exposing bones one-half inch to one inch deep. Insured meanwhile frequently complained about his foot. A few days before his death some of his fellow-workmen called on him, and to a suggestion that his foot hurt because coal dropped on it, Gertz replied: "No, I don't know nothing about coal dropping on it," and, again, he said, "I don't remember of any coal of any kind falling upon my leg." He was then apparently in full possession of his faculties.

The policy insured against, "bodily injuries, effected directly and independently of all other causes and solely through external, violent and accidental means." It also provided: "In the event of * * * injury due wholly or in part to or resulting directly or indirectly in or from * * * any disease or bodily infirmity, or * * * infection in any form or manner. * * * The Association shall not be liable." A further provision is: "Disability resulting from * * * abscesses, ulcers, and blood-poisoning, are classified as sickness, and are covered only under the sick benefit clauses of this policy."

The policy covered a variety of contingencies, with variant amounts to be paid, including not only death from accident, but loss of hands, feet, etc., indemnity while disabled from accident, partial disability, illness indemnity, and some eight or nine other contingencies, including death from sickness. It appeared that after insured died, plaintiff demanded payment

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of the "illness indemnity" of the policy. This was paid, as well as the amount payable, "if the death of the member results from sickness," and she signed a receipt "in full settlement of all claims." Plaintiff was assisted by her daughter, an intelligent girl twenty years of age. The action was tried by the court without a jury.

BRADLEY, HARPER & EHEIM, for plaintiff in error;
SAMUEL A. HARPER, of counsel.

LITZINGER, MCGURN & REID, for defendant in error;
EDWARD R. LITZINGER, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 667*—*when evidence sufficient to sustain finding that insured did not die as result of an accident.* In an action by the beneficiary named in a policy of accident insurance for the death of insured, alleged to be due to a lump of coal falling on insured's foot, evidence held to sustain a finding that insured did not come to his death by accident.

2. INSURANCE, § 421*—*when insurer not liable under policy for death due to blood poisoning or infection.* A policy of accident insurance providing that insurer should not be liable "in the event of * * * injury due wholly or in part to or resulting directly or indirectly in or from * * * any disease or bodily infirmity, or * * * infection in any form or manner, * * * held expressly to except death due to blood poisoning or infection through insured's foot, alleged to have been caused by an injury due to the fall of a piece of coal on the foot.

3. INSURANCE, § 488*—*when beneficiary estopped by settlement from maintaining action.* In an action by the beneficiary named in a policy of accident and health insurance to recover the amount payable in case of the accidental death of insured, where the policy also provided for an "illness indemnity," and an indemnity "if the death of the member results from sickness," and where it appeared that after the death of insured plaintiff was paid the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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amounts required by the policy in the last-named cases, signing a receipt "in full settlement of all claims," held that the action was barred, there being no evidence of fraud, and the right of action sought to be maintained depending upon contingencies and facts within the knowledge of plaintiff, so that she could settle with defendant on the basis of such knowledge, and, having done so, was precluded from asserting another claim.

4. INSURANCE, § 421*—*when claim for payment for accidental death due to blood poisoning not within policy.* Under a policy of accident and health insurance, which provides for a payment to beneficiary in case of the death of insured from sickness, a provision that disability resulting from ulcers and blood poisoning shall be classified as sickness excludes any claim for payments for accidental death, where it appears that insured died from an ulcer of the foot alleged to have been due to blood poisoning as the result of a lump of coal striking insured's foot.

Dominick Carbanaro, Defendant in Error, v. Great Northern Railway Company, Plaintiff in Error.

Gen. No. 21,639.

1. CONTINUANCE, § 19*—*when motion for continuance to obtain absent witnesses properly denied.* A motion for continuance to enable parties to secure the attendance of absent witnesses is properly denied where there is no sufficient showing of diligent effort before the trial to secure such attendance or of a reason why the depositions of such witnesses could not have been taken.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim in action by employee against railroad for negligent injuries sufficient.* In an action by an employee against a railroad company to recover for personal injuries, brought under a statute of a foreign State providing that "every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while * * * employed by such person or corporation so operating such railroad, * * * for such injuries * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such person or corporation," statement of claim examined and held to state a cause of action.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sufficient. A statement of claim will be deemed sufficient where no objection is made to it before trial and no objection is made to the evidence offered at the trial on the ground of variance.

4. RAILROADS—*when evidence sufficient to establish operation of railroad.* In an action by an employee to recover for personal injuries brought under the statute of a foreign State, where it appeared that at the time of the injury plaintiff was employed by defendant as a section hand, *held* that evidence that when so injured plaintiff was pushing a hand car loaded with scrap, shovels and iron bars, on top of which was a large door, along the tracks of defendant, and was injured by the door falling upon him, was sufficient to show an operation of the railroad within the meaning of the statute making defendant liable for plaintiff's injuries sustained by the negligence of defendant's servants "in or about the handling, movement, or operation of any train, engine, or car on or over such railroad."

5. RAILROADS—*what constitutes operation of railroad.* The movement of a hand car along a railroad is as much a use and operation of the railroad as the movement of a train of cars drawn by a locomotive.

6. MASTER AND SERVANT, § 737*—*when question whether section foreman negligent in placing door on top of loaded hand car for jury.* In an action by a railroad section hand to recover for personal injuries sustained as a result of being struck by a large door which fell from a hand car plaintiff was pushing when injured, such door having been placed by defendant's section foreman on top of a load of scrap, shovels, iron bars, etc., the question whether the foreman was negligent in placing the door on top of the load is for the determination of the jury.

7. MASTER AND SERVANT, § 626*—*when evidence of strong wind competent as bearing on negligence in placing door on top of loaded hand car.* In an action to recover for personal injuries sustained by a railroad section hand as a result of being struck by a large door which fell from a hand car which plaintiff was pushing when injured, such door being placed by defendant's section foreman on the car on top of a load of scrap, shovels, iron bars, etc., evidence that at the time of the accident a strong wind was blowing is competent on the question of the negligence of the foreman, either in loading the car or in failing to secure the door, or both.

8. MASTER AND SERVANT, § 697*—*when evidence sufficient to sustain finding of negligence of foreman.* In an action to recover for injuries sustained by a railroad section hand as a result of being struck by a large door which fell from a hand car which plaintiff was pushing when injured, such door being placed by defendant's

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

section foreman on the car on top of a load of scrap, shovels, iron bars, etc., a finding that the foreman was negligent, *held* proper under the evidence.

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the October term, 1915. *Affirmed*. Opinion filed January 17, 1916.

CHARLES A. WILLIAM and ROBERT J. FOLONIE, for plaintiff in error.

EARL J. WALKER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff while employed by defendant was injured. He brought suit for damages, and by verdict of a jury was awarded \$600. Judgment was entered for that amount, which defendant asks to have reversed.

Defendant first contends that error was committed by the trial court in overruling its motion for a continuance. We cannot agree with this claim. Suit was commenced on February 6, 1914; the case was called for trial March 29, 1915. No sufficient showing was made of diligent effort to procure the absent witnesses, and no reason shown why depositions could not have been taken. We think it reasonably clear that the attorneys did nothing or very little in the matter of procuring evidence for the defense until a short time before the case was called for trial.

Does plaintiff's statement of claim state a cause of action? We think it does. The accident happened in the State of Montana, where plaintiff was working on the railroad of defendant. The action was brought under a statute of Montana, which in part provides that:

"Every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such person

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or corporation so operating any such railroad, * * * for such injuries * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such person or corporation so operating such railroad in or about the handling, movement or operation of any train, engine or car on or over such railroad or by reason of any defect or inefficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The statement of claim alleged the negligence of the defendant in violation of the statute, and set forth sufficient facts from which by implication it was alleged that defendant was "operating a railroad" and that plaintiff received injuries while he was employed by such corporation, resulting from the negligence of agents or employees of such corporation in or about the handling, movement or operation of a car on or over such railroad; all of this is comprehended in the allegation that plaintiff, an employee, was injured while "pushing a certain hand car over and about defendant's tracks." No objection was made to the statement of claim before trial, nor any objection to evidence on the ground of variance.

It is insisted that the evidence shows plaintiff was not injured through the negligence of any officers, agents or employees of defendant "in or about the handling, movement or operation of any train, engine or car on or over such railroad." The evidence shows that plaintiff was employed on defendant's railroad as a section hand. On the day of the injury the foreman had the men load a push car with scrap and shovels, iron bars, etc., and on top of this the large door of a freight car was laid. This door on the top of the load was about level with plaintiff's head. Plaintiff and others then proceeded to push the loaded car along the tracks, and after going some distance the door fell off on top of plaintiff, injuring him. Does this operation

come within the statute? We hold that it does. This is in accord with the decision of the Supreme Court of the United States in *Chicago, M. & St. P. Ry. Co. v. Artery*, 187 U. S. 507. On page 515 the court says:

“The plaintiff was upon a moving car propelled by handpower. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were * * *. The railway was being used and operated in the movement of the hand car, quite as much as if the latter had been a train of cars drawn by a locomotive.”

The statute of Iowa is similar to the Montana statute. In *Cahill v. Illinois Cent. R. Co.*, 148 Iowa 241, the court passed upon an accident similar to the one before us and, in construing the Iowa statute, said:

“It is generally held by all courts where statutes similar to our Code, section 2071, have been enacted, that the provision is intended for the benefit of those railway employees, no matter in what department of service, whose duty for the time being exposes them to the dangers and hazards peculiar to the operation of railways. And surely when a man, in pursuance of his employment, rides or pushes or manages a hand car along the rails to transport tools or material or men, his service is as certainly ‘connected with the operation of a railway’ as is the man who handles the throttle upon an engine which pulls or pushes a car loaded with gravel or other road building material.”

To the same import, under similar facts, are the decisions in *Hardt v. Chicago, M. & St. P. Ry. Co.*, 130 Wis. 512; *Steffenson v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 355; *Rice v. Wabash R. Co.*, 92 Mo. App. 35; *Chicago, R. I. & P. Ry. Co. v. Stahley*, 62 Fed. 363.

We think it was a proper question for the jury to determine whether the conduct of the foreman in load-

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ing the heavy door on top of the load of scrap was negligence. There was evidence that a strong wind was blowing at the time, and the jury might properly have considered that under such circumstances there was negligence of the foreman, either in the manner of loading the car or in failing to secure the door, or both. We see no reason to disagree with the conclusion of the jury.

It should be noted that the Montana statute which was introduced in evidence abolishes any defense in actions of this sort based upon assumption of risk, negligence of fellow-servant and, in part, contributory negligence. The provision concerning contributory negligence is: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

We find no reversible errors either in rulings of the court on evidence or in giving and refusing instructions.

For the reasons above indicated the judgment is affirmed.

Affirmed.

Stefan Tyrakowski, Appellant, v. Hans A. Connell, Appellee.

Gen. No. 21,185. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action by Stefan Tyrakowski, plaintiff, against Hans A. Connell, defendant, in the Superior Court of Cook county, to recover for personal injuries sustained as a result of the alleged negligence of defendant in operating his automobile, so that plaintiff was struck by it while crossing a street. From a judgment for defendant, plaintiff appeals.

It appeared that the defendant was driving in the right-hand street car track in Milwaukee avenue. Plaintiff started to cross diagonally between two street intersections. The distance between the right-hand rail of the right-hand track and the curb was ten feet five inches. Plaintiff testified that he looked both ways and did not see the car, or know that one was on the street until struck. Defendant testified that he saw plaintiff when he stepped from the curb; being then fifty feet away and going at the rate of ten miles an hour; that the horn of his car was sounded five or six times, but as plaintiff paid no attention he applied the brakes and locked his rear wheels, but the track was wet and the car slid and struck plaintiff. The action was tried by jury and there was a verdict of not guilty.

THOMAS E. SWANSON and ELWYN E. LONG, for appellant.

No appearance for appellee.

Schoenfeld v. Kulwinsky, 197 Ill. App. 472.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 279*—*when paper signed by party not admissible for purpose of impeachment of witness.* In an action to recover for personal injuries sustained by being struck by defendant's automobile, alleged to have been negligently operated, it is not error to exclude a paper written in court by defendant at plaintiff's request as evidence tending to impeach defendant's testimony that he did not write a certain other paper in evidence.

2. EVIDENCE, § 450*—*when genuineness of handwriting may not be determined by comparison with other writing.* The genuineness of handwriting cannot be proved or disputed by comparison with other writing proved or admitted to be genuine unless the writing with which it is sought to be compared is properly in evidence and pertinent to the case.

3. INSTRUCTIONS, § 151*—*when requested instruction properly refused.* A requested instruction is properly refused where the jury are fully instructed as to the law of the case.

Robert A. Schoenfeld, Defendant in Error, v. M. Kulwinsky, Plaintiff in Error.

Gen. No. 21,494.

1. LANDLORD AND TENANT, § 364*—*how word "immediately" in Landlord and Tenant Act construed.* The word "immediately" as used in section 17 of the Landlord and Tenant Act (J. & A. § 7055), requiring one levying a distress warrant to immediately file with the clerk of a court of record of competent jurisdiction a copy of the warrant together with an inventory of the property levied upon, does not require him to file them immediately, but only requires him to act promptly and to file them in such convenient time as is reasonably requisite for doing so.

2. LANDLORD AND TENANT, § 398*—*when evidence sufficient to establish an immediate filing of copy of distress warrant and inven-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tory. Where within forty-four hours after the seizure, under a distress warrant, of goods which were removed, inventoried and stored, a copy of the warrant and the inventory were filed with the clerk of the court whose office was situated ten miles from the place of seizure, a jury may properly find that such filing was done "immediately" within the meaning of the statute.

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

COMERFORD & COHEN, for plaintiff in error.

WILLIAM H. TATGE, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Plaintiff Schoenfeld issued a distress warrant to collect \$100 of rent alleged to be due him from defendant Kulwinsky, and levied the same on 381 pairs of shoes, the property of defendant. The levy was made at four o'clock p. m., January 19, 1915. The goods were removed, stored, an inventory prepared, the suit begun, and a copy of the warrant and the inventory filed with the clerk of the Municipal Court before noon January 21st, about forty-four hours after the warrant was levied. The jury by their verdict found the issues as to the right of plaintiff to levy the distress warrant and as to the merits of the action against the defendant and assessed plaintiff's damages at the sum of \$100. The court denied defendant's motion for a new trial and gave judgment on the verdict, to reverse which Kulwinsky prosecutes this writ of error. Section 17 of the Landlord and Tenant Act (J. & A. ¶ 7055) provides that: "The person making such distress shall immediately file * * * with the clerk of a court of record of competent jurisdiction a copy of the distress warrant, together with an inventory of the property levied upon."

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The only ground of reversal urged by plaintiff in error in the brief is that a copy of the distress warrant and inventory was not immediately filed with the clerk. The only instruction asked by defendant was that the court direct a verdict for the defendant.

In strict construction, the word "immediately" excludes the lapse of any interval of time, but that is not the meaning of the word as used in the statute. The goods must be removed, an inventory prepared and a copy thereof and of the distress warrant made and filed with the clerk of the court. In the case at bar the distress warrant was levied nearly ten miles from the office of the clerk of the Municipal Court. We think that the word "immediately" as used in the statute did not require the plaintiff to file the warrant instantly, but only required him to act promptly and to file a copy of the warrant and inventory in "such convenient time as is reasonably requisite for doing the thing." Baron Alderson in *Thompson v. Gibson*, 8 Mees. & W. 281. In *People's Accident Ass'n v. Smith*, 126 Pa. St. 317, where the policy provided that, "immediate written notice" should be given, it was said, p. 325: "The word 'immediate' in the contract must be construed to mean within a reasonable time thereafter under all the facts and circumstances of the case, and what is a reasonable time must be decided by the jury unless, as before observed, the delay has been so great that the court may rule it as a question of law." To same effect are:

McCormick Harvesting Mach. Co. v. Brower, 88 Iowa 607; *Taber v. Royal Ins. Co.*, 124 Ala. 681; *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

We think that the jury from all the facts in the case might properly find that the plaintiff filed a copy of the distress warrant and inventory with the clerk of the Municipal Court "immediately" after the levy within the meaning of the word "immediately" as used in the statute, and the judgment is affirmed.

Affirmed.

**Andrews Allen and John A. Garcia, copartners, and
Allen & Garcia Company, Defendants in Error, v.
Arthur H. Swett, Plaintiff in Error.**

Gen. No. 21,508. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN C. WORK, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Suit by Andrews Allen & John A. Garcia, copartners, and Allen & Garcia Company, a corporation, plaintiffs, against Arthur H. Swett, defendant, to recover for services rendered the defendant. On judgment for the plaintiffs, the defendant brings error.

Suit was brought January 13, 1914, by Allen and Garcia, copartners as Allen & Garcia, against A. H. Swett. March 16, 1914, it was ordered that all papers and proceedings be and they thereby were amended by making Allen & Garcia Company, a corporation, co-plaintiff in the action. Garcia, a mining engineer, was asked by Swett to examine coal land in Iowa and make a report. He did so, and charged for his services and expenses \$338.20, for which sum the plaintiff had judgment. The Lucas Coal & Supply Company, a corporation of which Swett was president and treasurer and a director, was the owner of the mine, and the contention of the defendant was that the Lucas Company and not he was liable for the services rendered.

CASTLE, WILLIAMS, LONG & CASTLE, for plaintiff in error.

UNDERWOOD & SMYSER, for defendants in error;
CHARLES R. YOUNG and ARTHUR A. BASSE, of counsel.

Rand v. Bogle, 197 Ill. App. 476.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1714*—*when question of misjoinder of parties waived.* Where, on review on a writ of error, it does not appear that the plaintiff in error objected in the trial court on the ground of misjoinder of the plaintiffs below, and the propriety of such joinder is not questioned by any assignment of error, nor argued in the brief of the plaintiff in error except in his reply brief, such misjoinder, if any, must be considered as waived.

**Lon G. Rand, Defendant in Error, v. William S. Bogle,
Plaintiff in Error.**

Gen. No. 21,519.

1. **DIVORCE, § 172***—*when marriage of divorced person void.* A marriage celebrated in disregard of the prohibition of the Divorce Act, prohibiting remarriage of a divorced person within one year after the time of the divorce, is void wherever celebrated.

2. **HUSBAND AND WIFE, § 14***—*when existence of legal relation condition precedent to maintenance of action for necessities.* Under the statute it is a condition precedent to a recovery from a husband for family expenses that there be a legal relation of husband and wife.

3. **HUSBAND AND WIFE, § 14***—*when existence of legal relation essential to recovery for services rendered alleged wife.* In order to recover for the services of a dentist rendered to one alleged to be the wife of the defendant, it is essential that the legal relation of husband and wife exist between them.

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FAY, Judge, presiding. Heard in this court at the October term, 1915. Reversed. Opinion filed January 17, 1916.

**M. F. GALLAGHER and E. B. WILKINSON, for plaintiff
in error.**

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

JOSEPH R. BUBRES, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Plaintiff brought an action in the Municipal Court against plaintiff in error Bogle and Mrs. Cloe Barry and recovered for dental services rendered by plaintiff to Mrs. Barry. He recovered against both defendants and the writ of error was sued out in the name of both, but Bogle only assigned errors. His codefendant was summoned and there was a judgment of severance and he prosecuted this writ of error to reverse the judgment.

Recovery was allowed on the theory that the claim of the plaintiff was family expenses, for which both defendants were liable under the statute. Mrs. Barry was divorced October 8, 1912, and went through a marriage ceremony with Bogle November 4, 1912, and the parties lived together in Chicago from November, 1912, to September, 1913. Mrs. Barry filed a bill in December, 1913, for the annulment of her alleged marriage to Bogle, and a decree was entered January 6, 1914, declaring such marriage void and ordering that it be annulled. The Divorce Act prohibits either party from remarrying within one year from the time of the divorce, and a marriage celebrated in disregard of this prohibition is void wherever celebrated. *Wilson v. Cook*, 256 Ill. 460.

Under the statute it is a condition precedent to a recovery for family expenses that there be a legal relation of husband and wife. *Schlesinger v. Keifer*, 30 Ill. App. 253, affirmed in 131 Ill. 104; *Houghteling v. Walker*, 100 Fed. 253; *Holnback v. Wilson*, 159 Ill. 148.

There is in the record no evidence to support a recovery against plaintiff in error, and the judgment of the Municipal Court is reversed.

Reversed.

Mrs. F. G. Robertson, Defendant in Error, v. T. G. Warden, Plaintiff in Error.

Gen. No. 21,547.

1. PLEADING, § 400*—*when liability of each defendant must be established.* Where suit is brought against two defendants, the plaintiff, in order to recover must prove the liability of both.

2. HUSBAND AND WIFE, § 164*—*what does not constitute family expense chargeable on property of both husband and wife.* Under section 15, ch. 68, Rev. St. (J. & A. ¶ 6152), providing that expenses of the family shall be chargeable upon the property of both husband and wife, or of either of them, no recovery may be had against a husband for a dress made on the order of his wife which she has refused to accept, it not having been bought for family use and actually used or kept for use in the family.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed. Opinion filed January 17, 1916. Petition for rehearing struck from files January 31, 1916.

GARNETT & GARNETT, for plaintiff in error; CYRUS L. GARNETT, of counsel.

FRANCIS A. HARPER and ERNEST W. CLARK, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

The plaintiff, Mrs. Robertson, brought an action in the Municipal Court against the defendant, Warden, and his wife for the price of a black dress made by plaintiff for Mrs. Warden by her order, and a purple dress ordered by her. Mrs. Warden was not served with process and the action proceeded against Mr. Warden. The black dress was sent to Mrs. Warden at her residence in November, 1913, and was returned

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

by her to plaintiff for alteration. Plaintiff made certain alterations in the dress and sent it again to Mrs. Warden C. O. D., and she refused to accept it. Plaintiff sent the dress to Mrs. Warden again the next day, but she had gone to California and the dress was not delivered but was returned to plaintiff. The purple dress was not finished and both dresses remained in the possession of the plaintiff and were by her brought into court and tendered to Mr. Warden, who refused to receive them.

Having sued two defendants, plaintiff, in order to recover, was bound to prove that both were liable. The liability of the husband to plaintiff in error is claimed under section 15, ch. 68, Rev. St. (J. & A. ¶ 6152), which is as follows:

“The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately.”

This section was copied from the Iowa statute. In *Fitzgerald v. McCarty*, 55 Iowa 705, it was held that to constitute a family expense chargeable on the property of both husband and wife, an article must not only have been bought for family use but actually used or kept for use in the family; that it was not sufficient that an article was purchased for or on account of and with the intent that it be used in the family, although never used therein or by any member of the family. To the same effect is *Straight v. McKay*, 15 Colo. App. 60, 60 Pac. 1106. The precise question here involved does not appear to have been decided by any court of review in this state, but we concur in the decisions above referred to. As the conclusion thus reached is fatal to plaintiff's right of recovery, it is unnecessary to consider the other grounds of reversal argued.

The judgment of the Municipal Court is reversed.

Reversed.

Gibb v. Irving Park District, 197 Ill. App. 480.

**William R. Gibb, Appellee, v. Irving Park District,
Appellant.**

Gen. No. 21,585.

1. PARTIES, § 14*—*when party to contract need not be joined as party plaintiff.* Where in one instrument there are embodied two distinct contracts, one between the defendant and the plaintiff, and another between the defendant and the plaintiff and another, the plaintiff may sue on the former without joining his cocontractor in the latter, inasmuch as the contracts are as independent, for purposes of suit, as though embodied in separate instruments.

2. MASTER AND SERVANT, § 11*—*what constitutes satisfactory services.* Where a contract provides that services to be performed must be satisfactory to the employer, such clause means that the services should be such that, as a reasonable person, the employer ought to be satisfied therewith.

3. ARCHITECTS AND ENGINEERS, § 16*—*when evidence sufficient to sustain judgment.* In an action to recover for architect's services in preparing plans for a field house, evidence held sufficient to sustain a finding and judgment for the plaintiff.

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916. *Certiorari* denied by Supreme Court (making opinion final).

SPENCER WARD, for appellant.

TINSMAN & BLOCKI, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the Irving Park District, a municipal corporation, from a judgment for \$1,393.97 recovered against it by plaintiff Gibb for services as an architect in an action of the first class in the Municipal Court, which was tried by the court without a jury.

The contention that plaintiff cannot recover because the contract was by its terms between the plaintiff and Anderson, parties of the first part, and the defendant, party of the second part, cannot be sustained.

Two separate and wholly distinct subject-matters were agreed on—one the provision for all services except superintendency by Gibb, and the other the superintendency by Anderson under the supervision of Gibb. In *Howe Mach. Co. v. Hickox*, 106 Ill. 461, it was held that under a similar instrument there were two distinct contracts—one with A. and B., the other with B.—as much so as if written on separate papers, and that A. and B. should sue separately.

Where a contract provides that services to be performed must be satisfactory to the employer, such clause means that the services should be such that as a reasonable person the employer ought to be satisfied therewith. *Keeler v. Clifford*, 165 Ill. 544.

The contract did not fix or limit the cost of the field house for which Gibb was employed to draw plans. Plaintiff was employed as an architect by the board before February 5, 1912, and that day submitted to the board plans of a field house, with a showing that the approximate cost thereof would be \$54,500. The members of the board suggested that he draw plans for a field house to cost \$40,000, but afterwards they made repeated changes in the proposed field house, and plaintiff kept telling them that with such changes the field house would cost more than \$40,000. Among the changes so suggested was to have two locker rooms in place of one. When told to prepare plans for a field house to cost \$40,000, plaintiff asked if the board wanted an assembly hall and was told that they did not. Then President Ott told plaintiff that some of the ladies of the Club said they could not have a field house without an assembly hall; that such hall was one of the most essential things to have, and the president said they would have to have an assembly hall, and plaintiff included such hall in the new plans. This required the second story to be eighteen feet high in place of ten feet. President Ott testified that mem-

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bers of the board visited other field houses, and each member noticed something about those field houses that he would propose and the architect subsequently incorporated such suggestion in the sketch he was to submit at the next meeting. He told the board that with the changes suggested the field house could not be built for \$40,000 nor for \$45,000, but would cost in the neighborhood of \$50,000. Before the contract was made Gibb told the board that his estimate of the cost of the building according to the sketches was \$54,500. He asked for bids, by direction of the board, and the lowest bids amounted to \$55,917. August 26th the board resolved that because of the high figures of the bids all bids should be rejected, and the plaintiff was instructed to prepare plans for a field house to cost approximately \$40,000. Plaintiff made changes in the plans which would reduce the cost of the field house to approximately \$48,000, and submitted such plans to the board September 27, 1912. The board was dissatisfied with the plans so submitted and stated they preferred the old plans; that a field house built according to such plans would have more the appearance of a factory, garage or livery stable, and was not at all what the board wanted. President Ott testified that the board made a contract with another architect in the fall of 1912 to prepare plans for and superintend the construction of the field house. November 18th, Gibb presented to the board a bill for \$1,393.97 for services in making plans, specifications and details for a field house and taking estimates on same, and December 2, 1912, the board instructed its secretary to notify Gibb that the board denied any liability under his bill of November 18th.

It is not disputed that the reasonable value of plaintiff's services was equal to or greater than the amount of the recovery, and we think that from the evidence the court might properly find the issues for the plaintiff, and the judgment is affirmed.

Affirmed.

James D. Williams, trading as Williams Grain Company, Defendant in Error, v. Joseph Krug, Plaintiff in Error.

Gen. No. 21,134. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1915. Reversed with judgment of *nil capiat*. Opinion filed January 17, 1916.

Statement of the Case.

Action by James D. Williams, trading as Williams Grain Company, plaintiff, against Joseph Krug, defendant, to recover the purchase price of goods sold and delivered. From a judgment for the defendant, the plaintiff prosecutes a writ of error.

There was no personal equation between the parties to the transaction nor any prior dealings between them. The order on which the oats, etc., were delivered was by telephone, but the person who gave the order, if any was given, remains unidentified. No attempt was made to verify the order, but the oats, bran, etc., were delivered not to defendant but at a barn near 3927 Prairie avenue, Chicago, where three other Krugs—William, George and Henry—kept horses. The receipts for the oats offered in evidence were signed neither by defendant nor by any person authorized by or acting for him. Furthermore, the testimony demonstrated that at the time the oats, grain, etc., were delivered by plaintiff, defendant had a contract with another firm for these commodities, which were supplied by said firm to defendant regularly during that time.

L. A. SHERWIN, for plaintiff in error.

PATTISON & SHAW, for defendant in error; DOUGLAS C. GREGG, of counsel.

Guzik v. Tomczak et al., 197 Ill. App. 484.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 329*—*when sending of bills and retention thereof not evidence of liability for goods.* Where, in an action for the purchase price of goods sold and delivered, there is no evidence that the defendant contracted therefor and it appears that he, in fact, did not receive them, the mere sending to him of bills therefor by the plaintiff and the defendant's retention of them is of no value as evidence of the defendant's liability to pay for such goods.

2. CONTRACTS, § 69*—*when no right of action exists at law.* The law affords no relief for simply moral claims, as distinguished from legal claims.

3. SALES, § 329*—*when evidence insufficient to sustain judgment.* In an action for goods sold and delivered evidence held insufficient to sustain a judgment for the plaintiff.

Joseph Guzik, Defendant in Error, v. Malgorzata Tomczak and John Tomczak, Plaintiffs in Error.

Gen. No. 21,192. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed January 17, 1916.

Statement of the Case.

Action by Joseph Guzik, plaintiff, against Malgorzata Tomczak and John Tomczak, defendants, owners of premises leased by plaintiff, for damages for unlawfully entering upon the leased premises and making repairs. From a judgment for plaintiff, defendants appeal.

L. J. HAIGLER, for plaintiffs in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

LEE W. CARPENTER, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 433*—*what does not constitute extension of lease.* There was no extension of a lease where the landlord, before the expiration of the old lease, notified the tenant by letter that he would expect prompt surrender of the premises at the expiration of the term, as he had made a lease to another person; that possession was necessary to make needed repairs and that if the tenant remained in possession after expiration of the term he would be charged double rent; and, after expiration of the term, the tenant vacated the premises after the landlord commenced making repairs, and the subsequent tender of double rent was refused.

2. CONTRACTS, § 8*—*necessity of certainty in terms of.* A contract, in order to be binding, must be definite in all its provisions.

3. INSTRUCTIONS, § 118*—*when instruction refused as not applicable to evidence.* In an action for damages for unlawfully entering upon leased premises and making repairs, an instruction that it was the tenant's duty to vacate the premises at the time of the expiration of the lease unless the jury found from the evidence that the tenant made arrangements with the landlord whereby he was to retain possession after the expiration of the lease, held erroneous where there was no extension or renewal of the lease.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherburne v. McGuire, 197 Ill. App. 486.

Edward H. Sherburne, Appellant, v. Charles J. McGuire, Appellee.

Gen. No. 21,346. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action of trespass by Edward H. Sherburne, surviving plaintiff, against Charles J. McGuire, defendant, for breaking the close of plaintiff and digging and carting away the soil from his land. From a judgment for plaintiff for \$34.20, plaintiff appeals.

Defendant admitted the trespass and the carrying away from plaintiff's land fifteen wagons of soil, containing two cubic yards per wagon, while plaintiff insisted that defendant carried away two hundred loads of soil. The admitted value of such soil was \$1.14 per cubic yard.

JUDAH, WILLARD, WOLF & REICHMANN, for appellant.

CHARLES P. MOLTHROP, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1748*—*when judgment based upon verdict will be affirmed.* The Appellate Court will not disturb a judgment resting upon the verdict of a jury unless it is apparent from all the evidence that the verdict is clearly contrary to its preponderating force, or that the rulings of the court in its procedure and in its instructions were calculated to mislead the jury to the complaining party's injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherburne v. McGuire, 197 Ill. App. 486.

2. TRESPASS, § 49*—*sufficiency of evidence as to amount of soil taken*. In an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land, evidence held sufficient to sustain a finding that the amount of soil taken and its value was as claimed by defendant.

3. TRESPASS, § 48*—*when penal ordinance prohibiting removal of soil inadmissible*. An ordinance of the City of Chicago, section 1495 of the Revised Municipal Code, providing for a penalty for the offense of unlawfully taking away earth from the land of another without first obtaining a permit, is inadmissible in evidence in an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land.

4. TRESPASS, § 48*—*when evidence of obtaining permit to dig and cart away soil immaterial*. In an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land, evidence that defendant obtained a permit to take away the soil is immaterial in the absence of proof that such permit was obtained from the owner of the land.

5. APPEAL AND ERROR, § 1466*—*when admission of immaterial evidence harmless error*. The admission, in an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land, of immaterial evidence as to having obtained permit from one other than the owner of the soil pilfered, was harmless error where the question involved was as to the amount of the soil taken.

6. TRESPASS, § 48*—*when evidence of arrest of defendant's employees for taking soil irrelevant*. In an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land, evidence that some of defendant's employees were arrested for purloining soil from land of plaintiff was irrelevant, the only issue being the amount of the soil taken.

7. TRESPASS, § 48*—*when evidence that person not employed by defendant took soil admissible*. In an action of trespass for breaking the close of plaintiff and digging and carting away soil from plaintiff's land, in which the issue is to the amount of soil taken, evidence that men who were not servants or agents of defendant dug and carted away soil of plaintiff's is admissible to rebut any inference that such men were acting for defendant, so that he should be charged with the soil removed by them.

8. APPEAL AND ERROR, § 524*—*when objection to argument of counsel insufficient*. A general objection to the argument of counsel at the end thereof is insufficient, as objections should be specific so that the court may be able to rule thereon.

9. INSTRUCTIONS, § 96*—*when instruction on credibility of witness*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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correct. An instruction that if the jury believed from the evidence that any witness had sworn falsely as to any material fact in issue then the entire testimony of the witness might be disregarded, except in so far as corroborated by other credible evidence or by facts or circumstances proved on the trial, approved.

Walter Katsoff, Defendant in Error, v. Morris Goodman, Plaintiff in Error.

Gen. No. 21,417. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action by Walter Katsoff, plaintiff, against Morris Goodman, defendant, for commissions for procuring woollens. From a judgment for plaintiff for \$503.50, defendant brings error.

BREDING & GESAS, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*what weight to be accorded findings of court.* The same weight must be accorded the finding of the trial court as is given to that of a jury.

2. APPEAL AND ERROR, § 1414*—*when findings of trial court conclusive.* A judgment for the plaintiff upon a finding by the trial court will not be disturbed when the uncontradicted evidence of the plaintiff is sufficient to sustain the judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O. C. Wilson Advertising Company, Defendant in Error, v. Edward A. Renwick, Plaintiff in Error.**Gen. No. 21,499.**

1. **BILLS AND NOTES, § 426***—*what evidence inadmissible to show payment of coupon notes.* In an action upon two detached negotiable interest coupon notes payable to bearer without condition by the holders, *held* that evidence of payment by the maker of the interest upon the entire issue by indorsement of an architect's certificate to the holder of the trust deed securing the bonds from which the coupons were detached was properly excluded where it was not shown that the trustee had any sum belonging to defendant in its possession or that the architects had authority to make such a certificate.

2. **BILLS AND NOTES, § 102***—*when interest coupon negotiable instrument.* Interest coupons which are detached from bonds and are payable to a bearer at a specific time and place, subject only to the limitation that the bond has not been paid before maturity of the interest coupon, are negotiable, and are free from any limitation contained either in the bond from which they were detached, or the trust deed securing them.

3. **BILLS AND NOTES, § 84***—*how terms of interest coupon notes construed.* The terms of interest coupons which are payable to bearer at a specific time and place, subject only to the condition that the bonds are not paid before maturity, must be construed strictly against the maker, without reference to the bond from which they were detached, or the trust deed securing them.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

ZEISLER, FRIEDMAN & ZEISLER, for plaintiff in error.

FRANK P. MIES, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is a suit upon two coupon interest notes for \$3, each being a half yearly instalment of interest due

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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on two bonds for \$100, each secured, with other bonds aggregating \$650,000, by a trust deed to Simon W. Straus as trustee, conveying a leasehold for a term of ninety-nine years of certain land in the City of Chicago and the Fort Dearborn Hotel situate thereon. The coupon interest notes are in the following form:

"On the first day of October, A. D. 1913, Edward A. Renwick will pay the bearer, at the office of S. W. Straus & Co., incorporated, in Chicago, Illinois, Three (\$3.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness being six (6) months interest on his bond dated April 1, 1913, numbered 632 (unless said bond shall have been previously redeemed or have become subject to redemption) with interest on the amount of this coupon after its maturity at the rate of seven (7%) per annum.

Chicago, April, 1913.

EDWARD A. RENWICK."

The bonds and coupons are all payable at the office of S. W. Straus & Company, a corporation, in Chicago. On a trial before court and jury the court instructed a verdict in favor of plaintiff and entered a judgment thereon for \$6, and defendant brings the record here for review. In the bonds it is recited that reference is made to the trust deed "with the same effect as if herein fully set forth," and that "said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and construed together as parts of one and the same contract."

The trust deed recites that all of the bonds are to be issued, received and negotiated subject to certain conditions contained in forty of its sections, by section 7 of which it is provided that when the grantor, Renwick, shall deposit with the Straus Company the sum necessary to make a payment of principal or interest, the grantor's liability to pay the principal and interest covered by such deposit was *ipso facto* discharged and the holders were relegated to the Straus Company for payment.

These provisions we think are novel, in that the maker of the bonds, coupons and trust deed attempts to make the Straus Company the collecting agent of the holders of the bonds and coupons secured by the trust deed, and to discharge the primary liability of the maker upon the payment of the amount due by him from time to time to the Straus Company. Whether the maker has succeeded in shifting his primary responsibility upon the holders of the bonds, we do not feel called upon, in the condition of this record, to decide.

It seems that defendant attempted to pay the interest maturing on the whole indebtedness on the first of October, 1913, to Straus & Company by an architect's certificate for \$19,500, the amount of interest due on that date. On the back of this architect's certificate was the indorsement: "S. W. Straus & Co. Please pay the within order and charge the same to my Bond Issue Loan Account with you. Edward A. Renwick." This, we think, was properly excluded, as there was nothing in the record to show that Straus & Company had \$19,500 or any other sum belonging to defendant in its possession. Neither is there any evidence in the record that the architects had any authority to make such a certificate. One Wolff, cashier of the Straus Company and its employee for twelve years, testified that he sent to the defendant a letter reciting as follows:

"We beg to acknowledge receipt of your check for \$19,500 in payment of the following items: * * *

"Interest coupons made by yourself for \$19,500.00 Fort Dearborn Hotel.

"The above coupons cancelled will be mailed to you as soon as received by us.

Yours truly,

S. W. Straus & Co.
W."

Defendant followed this up by offering in evidence a check dated September 30, 1913, drawn by S. W.

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Straus & Company, to its order, for \$19,500 on the Fort Dearborn National Bank of Chicago, which is indorsed by Straus & Company to the order of the Fort Dearborn National Bank. While, in the view we take of the case, this evidence was properly excluded, still we cannot understand, in the light of the foregoing admission by Straus & Company, why they did not pay the interest coupons in suit.

The interest coupons in evidence are detached from the bonds and are payable to bearer at a specific time and place, and therefore are negotiable, subject to the rules of law governing negotiable instruments. In discussing the negotiability of like coupons the court said in *Bowman v. Neely*, 137 Ill. 443:

"By commercial usage, such coupons, when payable to bearer, have the legal effect of promissory notes, by the law merchant, and possess the attributes of negotiable paper. * * * They are written contracts for the payment of a definite sum of money on a given day, and pass from hand to hand, by commercial usage, as negotiable paper." *Town of Eagle v. Kohn*, 84 Ill. 292.

The holding in *First Nat. Bank v. Bennington*, 16 Blatchf. (U. S.) 53, is to the effect that a coupon not under seal, payable to bearer at a definite time and place, is a complete instrument within itself and may be declared on without reference to the bond, and that assumpsit is an appropriate form of action.

It will be observed from the copy of one of the coupons sued upon, above set out, that it is without condition or limitation (unless the bond to which it is attached is paid before maturity of the interest coupon) and does not refer to any provisions contained in the trust deed securing it. We therefore treat these coupons as independent claims and negotiable instruments, free from any limitation contained either in the bond from which they were detached or the trust deed securing them.

We are not permitted to indulge in any construction which does not reasonably arise from the literal

terms of the interest coupons; we have no right to hark back to the bond or trust deed for aid in their interpretation. As the defendant is the maker of these interest coupons and created their terms and conditions, these terms must be construed strictly against him, and as they are by their terms payable without condition, the defense proffered is unavailing to prevent a recovery.

The judgment of the Municipal Court being without error, it is affirmed.

Affirmed.

**City of Chicago, Defendant in Error, v. Henry Jacobi,
Plaintiff in Error.**

Gen. No. 21,510. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Prosecution by the City of Chicago against Henry Jacobi, defendant, charging defendant with a violation of section 2012 of the Revised Municipal Code of Chicago. To reverse a judgment of conviction entered on a verdict of guilty, with a fine of two hundred dollars, defendant prosecutes this writ of error.

CANTWELL & SMITH, for plaintiff in error.

SAMUEL A. ETTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Laskey v. Mendelson et al., 197 Ill. App. 494.

Abstract of the Decision.

1. APPEAL AND ERROR, § 822*—*when rulings on motions must be preserved in bill of exceptions.* In order to preserve for review the rulings of the trial court on motions, the evidence of such rulings must be preserved in a bill of exceptions, and it is not sufficient that the rulings are copied into the statutory record.

2. APPEAL AND ERROR, § 824*—*when exceptions to rulings of trial court not part of record.* Exceptions to the rulings of the trial court which appear in the record but are not preserved by the bill of exceptions are not a part of the record, and the errors assigned thereon cannot be considered on review.

3. MUNICIPAL COURT OF CHICAGO, § 28*—*how rulings on petition for change of venue must be preserved for review.* The rulings of the Municipal Court on a petition for a change of venue are not before the Appellate Court unless the petition and rulings thereon appear either by a bill of exceptions, stenographic report or a statement of facts as provided by section 23 of the Municipal Court Act (J. & A. ¶ 3335).

4. APPEAL AND ERROR, § 1751*—*when judgment affirmed on writ of error.* On a writ of error where the questions sought to be presented are not preserved in such manner that they can be reviewed by the Appellate Court, the judgment of the lower court must be affirmed.

H. Laskey, Defendant in Error, v. Samuel Mendelson and Benjamin Mendelson, trading as Mendelson Brothers, Plaintiffs in Error.

Gen. No. 21,548. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action by H. Laskey, plaintiff, against Samuel Mendelson and Benjamin Mendelson, trading as Mendel-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

son Brothers, defendants, in the Municipal Court of Chicago, to recover for goods sold and delivered. This case was previously before this court (191 Ill. App. 597), where the judgment was reversed. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

MOSES, ROSENTHAL & KENNEDY, for plaintiffs in error; SIGMUND W. DAVID, of counsel.

ISADORE S. BLUMENTHAL, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 329*—*when evidence sufficient to establish sale.* In an action to recover for goods sold and delivered, where the defense was that the goods sued for were sold to a corporation which later became bankrupt, and not to defendants individually, evidence held to sustain a finding that plaintiff had maintained his claim by a preponderance of the credible evidence, it appearing that defendants owned all the stock of such corporation with the exception of one share, and that the bankruptcy schedules filed by such corporation did not list plaintiff as a creditor.

2. SALES, § 326*—*when evidence tending to show sale to third person immaterial.* In an action to recover for goods sold and delivered, where the defense was that the goods sued for were sold to a corporation which later became bankrupt, and not to defendants individually, it is immaterial that defendants and such corporation were in the same line of business, or that defendants' wagons were lettered with the name of the corporation, or that a fire destroyed the books and property of the corporation, since none of these conditions were chargeable in any way to the act of plaintiff.

3. ACCOUNT STATED, § 4*—*when recovery not barred.* Where it is undisputed that an account sued on has not been paid, recovery thereon is not barred by the fact that while the suit was pending plaintiff rendered other bills to defendants, which were paid by them, whether the delay in rendering the account sued on was due to accident or to design on the part of plaintiff.

4. SALES, § 329*—*when fact that seller refused to prove claim*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in bankruptcy not evidence of liability of third person. In an action to recover for goods sold and delivered, where the defense was that the goods sued for were sold to a corporation which later became bankrupt, and not to defendants individually, the refusal of plaintiff, on request, to prove his claim in bankruptcy is consistent with his attitude in the action, that defendants and not the corporation were his debtors.

The Slaymaker Lock Manufacturing Corporation, Defendant in Error, v. Leon A. Olmsted, Plaintiff in Error.

Gen. No. 21,578.

1. SALES, § 18*—*what does not constitute acceptance of offer of sale of goods.* Where a vendee orders good at specified prices, and vendor ships the goods invoiced at higher prices, with the privilege of returning the goods if vendee is not satisfied, there is no meeting of the minds of any valid acceptance of vendee's offer by vendor where it appears that vendee never accepted the goods at the prices fixed by vendor, although vendor subsequently sent vendee a new invoice of the goods at the prices named in vendee's offer.

2. CONTRACTS, § 40*—*when acceptance of offer must be made.* A vendor who has refused the offer of vendee to buy goods at named prices and made a counter proposition as to price, cannot without the consent of vendee, later withdraw his counter proposition and accept vendee's original offer so as to bind vendee to the contract.

3. CONTRACTS, § 44*—*when offer must be unconditionally accepted.* A mere proposal by one person to make a contract constitutes no bargain of itself, and the proposal must be unconditionally accepted by the person to whom it is made in order to make a contract.

4. CONTRACTS, § 44*—*what constitutes rejection of offer.* If a party to whom an offer had been made accepts the offer conditionally, or requests modifications or changes in the offer, such action in law constitutes a rejection of the offer and amounts to a new proposal, which is ineffectual to complete the contract until accepted by the first proposer.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Slaymaker Lock Mfg. Corp. v. Olmsted, 197 Ill. App. 496.

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here for defendant. Opinion filed January 17, 1916.

WILLIAM A. BARNES, for plaintiff in error.

BAKER & HOLDER, for defendant in error; W. W. HOOVER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Defendant brings before us for review the record of a judgment against him for \$135.19. The trial was before the court without a jury. The record shows without contradiction that defendant ordered of plaintiff certain brass padlocks, etc., at the total price of \$139.39. Concerning this order plaintiff wrote defendant: "Your order Oct. 27th, No. A 9,003, specifies prices which, with the exception of \$3,903, are not now in existence. We are giving you the best prices possible." Then follows a list of goods by numbers and the prices for each and the letter continues: "We are shipping the goods at once, thinking you may be in immediate need, but please make no deductions from the prices given, and if our action in an effort to give you prompt service by shipping these at the best prices, without first waiting for confirmation of these prices from you, does not meet with your approval, you may return the goods, but do not make any deduction from the invoice." The goods were received by defendant and he, in repudiation of the attempt of plaintiff to foist the goods upon him at its own price, notified plaintiff that he would return the goods and asked for a check for \$2.46 for cartage, etc., which defendant had necessarily paid upon the goods.

Other correspondence ensued between the parties, in which was a letter from Slaymaker, the president

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of plaintiff, to defendant of November 16, 1914, in which he said:

"I am sorry you take the attitude you do; but we are enclosing a new invoice, putting these goods at the old prices, which we trust is satisfactory to you and will close the incident. We do not like to have you feel so you better have the goods. We are better off to put in new line now than later. Send along your check."

Plaintiff then wrote defendant:

"Answering your note on our letter Nov. 16th, we regret we cannot meet your requirements. You ordered goods; we shipped them; you objected to the prices. We then adjusted the prices in accordance with your order, while the goods were yet in your hands. Under the circumstances there is nothing further to say than the bill is again returned to you, the transaction having been in entire accord with the requirements of your order and correspondence. Please see that the bill is passed and properly paid when it comes due."

To this letter defendant replied:

"Your business intelligence is beyond our grasping. You occupy the most unique position in business that I have had the misfortune to discover in twenty-five years of cruising. Please read your letter of Oct. 29th and believe us no fools. Send along your check to cover our outlay or within ten days will send to Public Warehouse at your expense."

Plaintiff then drew a draft on defendant for \$135.39, the amount of its invoice, which was returned unpaid. Suit was then threatened by plaintiff and started. The foregoing evidence is that of plaintiff.

Plaintiff also read certain interrogatories propounded to defendant and his answers thereto, and it was then agreed between counsel that the parties to the action had been doing business together between three and four years prior to the transaction in dispute; that the goods involved in this litigation were received by defendant, that the invoice accompanied the bill of lading, that defendant had paid certain freight

charges and that the goods were packed in two cases and were then at the warehouse of defendant. The defendant offered no testimony but moved for a finding in his favor.

The plaintiff has proven that the order of defendant was not accepted, that goods embraced in the order were billed at advanced prices, and that defendant had the privilege of returning them if he was not satisfied with the prices. Defendant refused to accept and pay for the goods and demanded to be reimbursed the amount he had paid out for freight and cartage. It is clear, therefore, that the minds of the parties never met, that the offer of defendant was never accepted by plaintiff and that defendant never accepted the goods at the prices fixed by plaintiff, although subsequently plaintiff sent defendant a new bill with the prices the same as in the original order. At no time during the negotiation between the parties was there an offer and an acceptance. Plaintiff could not, without the consent of defendant, withdraw his counter proposition and accept the original offer which defendant had made. As said by Mr. Justice Baker in *Cheboygan Paper Co. v. Swigart Paper Co.*, 140 Ill. App. 314: "A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be unconditional. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer."

It was held by this court in *Goodridge v. Wood*, 133 Ill. App. 483, that it is a principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer unless

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the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes an obligation upon neither.

The judgment of the Municipal Court is wrong and is reversed, and a judgment is entered in this court in favor of defendant on his counterclaim and against plaintiff for the sum of \$2.46.

Judgment reversed and judgment here for defendant.

William H. Weber and Elsie Merckle, Trustees of the Estate of Henry Merckle, Deceased, Defendants in Error, v. American Posting Service, Plaintiff in Error.

Gen. No. 21,591.

1. APPEAL AND ERROR, § 1712*—*when errors waived*. Errors assigned but not argued are waived.

2. EVIDENCE, § 48*—*when burden of proof on defendant to establish affirmative defense*. Where defendant pleads an affirmative defense, he has the burden of maintaining such defense by a preponderance of the evidence.

3. CONTRACTS, § 289*—*how contract may be terminated*. A written contract which by its terms is to operate until terminated by one of the parties in a manner provided for in the contract cannot be terminated by the verbal agreement of the representatives of the parties, or in any manner other than that provided in the contract.

4. CONTRACTS, § 289*—*when parties bound by terms*. A written contract binds the parties thereto as to all its provisions, including the manner therein specified as that in which the term of the contract might be terminated.

5. CONTRACTS, § 377*—*when evidence of notice of termination admissible*. In an action to recover rent under a "billboard contract," providing that the obligation of the contract might be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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terminated by either party on giving thirty days' notice, evidence that plaintiff gave such notice is competent to show that the contract had been terminated in order to fix the time for which defendant was liable for rent in the action, being evidence in limitation of such liability.

6. *CONTRACTS, § 220*—how agreement not to rent land to another for specified period construed.* An agreement not to rent land to a third party for billboard purposes for one year is to be interpreted as being limited to the time during which the contract is in force, since after the contract was terminated, it wholly lacked vitality and was in no part binding on the parties.

7. *CONTRACTS, § 220*—when immaterial that terms of terminated contract violated.* In an action to recover rent due under a "billboard contract," the obligation of which had been terminated in a manner provided by the contract prior to bringing the action, the rights of the parties must be adjudged under the contract as it existed at the time it was terminated, and it is therefore immaterial that after such contract was terminated plaintiff rented land to a third person for billboard purposes in violation of the terms of the contract.

Error to the Municipal Court of Chicago; the Hon. GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916. Rehearing denied January 31, 1916.

CHYTRAUS, HEALY & FROST and JOHN PETER BARNES,
for plaintiff in error.

LEE J. FRANK and MARY LEE COLBERT, for defend-
ants in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiffs recovered a judgment for \$350 against defendant in the Municipal Court on the verdict of a jury, and defendant has sued out this writ of error and asks a reversal of that judgment. The contract is what is colloquially known as a "billboard contract," plaintiffs being the owners of the land on which defendant was granted license and permission to erect

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and maintain billboards. The contract is in two parts and both parts are dated August 1, 1913. By the terms of the contract defendant was to pay \$50 per month in advance on the first day of each calendar month, beginning August 1, 1913, and the contract was terminable by either party giving to the other a thirty-day notice on the first day of any month.

The second part of the agreement provided that if plaintiffs should take advantage of the thirty-day clause within the first four months, viz., before the first of December, 1913, plaintiffs were willing to refund defendant whatever sum it may have paid on the contract. It was further stipulated that plaintiffs would not grant to anyone else for one year from August 1, 1913, the billboard advertising privilege.

Defendant on August 18, 1913, tendered plaintiffs a check for \$50, which check recited on its face that it was for rental from August 15, 1913 to September 15, 1913—this upon the contention of defendant that August 15th was the earliest time after the receipt of the contract that he could procure a permit from the building department of the City of Chicago to erect billboards. This check was accompanied by a voucher, both of which were returned to defendant. Afterwards one Robertson, representing the defendant, called upon Pfeiffer, representative of plaintiffs, with the check and voucher and offered the same to Pfeiffer, which he refused to accept. Defendant contends that at that interview the contract was canceled by the instruction of Pfeiffer and the agreement of Robertson.

Defendant paid no rent, nor tendered any, after the tender of the \$50 check above mentioned. Thereupon, on February 1, 1914, plaintiffs gave thirty days' notice of the termination of the lease, and thereafter commenced this suit for seven months' rent, being from August 1, 1913 to March 1, 1914. On May 21, 1914, plaintiffs leased the premises in question to a third party for billboard purposes. Defendant claims

that it did not receive the leasing contract until about August 12, 1913. Simmons, the witness on this point, admits that he left for his vacation on August 1st, and did not return until August 12th, when he opened his mail and found the leasing contract in it and stamped it with the receiving stamp as of that date; that this is all he knows as to the time when the contract was sent to defendant, and he admits that his only means of knowledge is the receiving stamp.

Defendant assigns as error and argues that the contract was canceled, that the thirty-day notice terminating the contract should not have been admitted in evidence, that the judgment is against the weight of the evidence and that the leasing within the year of the premises to a third party for billboard purposes was contrary to the covenant in the contract and defeated plaintiffs' right to recover rent.

While errors are assigned upon the instructions of the court to the jury, they are not argued, and therefore such errors are waived. The defense interposed by defendant being an affirmative defense, the law cast upon it the burden of maintaining such defense by a preponderance of the evidence. This it failed to do.

The contract is dated August 1, 1913. Defendant promised to pay monthly rental for the premises in that contract leased, commencing with the date of the contract. There is no evidence that the contract was not delivered upon the day of its date or that defendant was prevented from taking possession of the premises on the date which it had a right to do under the contract.

The contract could not be terminated except in the manner provided for by its terms. The conversation between Robertson and Pfeiffer, if it occurred, would not work such termination. The terms of the contract, it being in writing, bound the parties as to all its provisions, including the manner in which the term granted by it might be terminated. Either party to the

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contract had the right under its terms to terminate it by giving to the other party thirty days' notice. The privilege so to do was the right of both parties. The receiving in evidence, therefore, of the notice terminating the contract was not error. It was necessary to show that the contract had been terminated in order to fix the time for which the defendant was liable to pay rent. It was evidence in limitation of the liability of defendant.

After the termination of the contract by plaintiffs and on May 21, 1914, a lease was granted to a third party for billboard purposes, and it is contended that this was a violation of the condition in the contract that "the privilege of billboard advertising will not be granted anybody else for one year from date, August 1, 1913," and that such violation extinguished plaintiffs' right to recover rent.

The agreement not to rent to a third party for billboard purposes for one year is, by interpretation, limited to the time during which the contract was in force. After the contract was ended, all of its provisions lacked vitality and were no longer binding upon the parties. Plaintiffs terminated the contract in the manner provided by its terms and it ended more than two months prior to the time the property was again leased. The rights of the parties must be adjudged under the contract as it existed at the time it was terminated.

We find no error in procedure. The trial was fair, the defendant was accorded all of its rights in such trial under the law, and the judgment of the Municipal Court is therefore affirmed.

Affirmed.

**Clinton Company, Defendant in Error, v. Otto G. Stiles,
Plaintiff in Error.**

Gen. No. 21,662. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

Statement of the Case.

Action by the Clinton Company, a corporation, plaintiff, against Otto G. Stiles, defendant, in the Municipal Court of Chicago, to recover for printed matter sold and delivered. To reverse a judgment for plaintiff for five hundred and fifty dollars, defendant prosecutes this writ of error.

One Gustave H. Knospe and defendant were doing business under the name of Northern Investment Company. Knospe contracted with plaintiff in the name of the Investment Company for printing matter designated as "Bank of Prosperity Certificates." The whole order was for 4,250,000 certificates, 1,250,000 of which were delivered to and paid for by Knospe. Afterwards defendant bought from Knospe the business of the company, assuming its liabilities as part of the consideration and continuing to transact business in its name. Among other liabilities assumed was plaintiff's claim in this action, although defendant contended otherwise. The certificates were delivered to defendant at his place of business, but he rejected them. Defendant wrote to plaintiff:

"The sample of the Bank of Prosperity bills that you sent to me are not quite up to standard, either in regard to quality or color of the sample on which you contracted to furnish me. I hereby notify you that I shall refuse to accept same and look to you to reimburse me on any losses I may sustain by being delayed on the advertising matter.

NORTHERN INVESTMENT Co.,
Per O. G. Stiles, Mgr."

Clinton Company v. Stiles, 197 Ill. App. 505.

The case was tried by jury. At the close of plaintiff's evidence defendant moved for a peremptory instruction in its favor, which was denied, and the case went to the jury on plaintiff's evidence, defendant not offering any evidence. The jury found a verdict for plaintiff.

CHARLES R. NAPIER and CHARLES S. McILVAINE, for plaintiff in error.

DANIEL P. TRUDE, for defendant in error; M. MARSO, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 154*—*when letter constitutes admission of assumption of liability by third person.* In an action to recover for printed matter sold and delivered, where the contract for such printed matter was made by one whose liabilities defendant assumed as part of the consideration by which he purchased such person's assets and business, and where the defense was that defendant never assumed liability to plaintiff, a letter written by defendant to plaintiff, complaining of the quality of the printed matter delivered as being in breach of a contract, and threatening to hold plaintiff liable for such breach, held to be an admission of defendant's assumption of liability on such other person's contract with plaintiff.

2. FRAUDS, STATUTE OF, § 22*—*when contract assuming debts not within statute.* In an action to recover for printed matter sold and delivered, where plaintiff's cause of action was based on the assumption by defendant of the liabilities of one who had contracted for the sale and delivery of the printed matter sued for, such assumption being part of the consideration of the purchase of such third person's assets and business, contract held not void under the Statute of Frauds as being a promise not in writing to pay the debt of another, the statute having no application to such a case.

3. CONTRACTS, § 349*—*when action maintainable by party in in-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

terest. A third person for whose benefit a contract has been made may maintain an action for breach of the contract.

4. FRAUDS, STATUTE OF, § 13*—*what constitutes original undertaking.* A contract made for the benefit of a third person is an original undertaking and is not required to be in writing under the Statute of Frauds, such a contract not being within the statute.

5. CONTRACTS, § 349*—*when third person may maintain action on contract for his benefit.* In order that a third person may maintain an action on a contract made for his benefit, it is not necessary that the consideration of the contract move from such third person, providing he elects to affirm the promise made in his behalf.

6. CONTRACTS, § 349*—*what constitutes affirmation by third person of promise on his behalf.* A third person who brings suit on a contract made for his benefit thereby affirms the promise made in his behalf.

7. MUNICIPAL COURT OF CHICAGO, § 13*—*what constitutes waiver of objection to statement of claim.* A defendant waives objection to plaintiff's statement of claim in that such claim does not state a cause of action by pleading and proceeding to trial on the merits.

8. MUNICIPAL COURT OF CHICAGO, § 13*—*when defense not pleaded in affidavit of merits unavailable.* In an action to recover for goods sold and delivered, the defenses that the goods delivered are unsatisfactory or not in accordance with the contract are not available to defendant on the trial if he has not pleaded such defenses in his affidavit of merits, since defendant on the trial is limited to the defenses made by his pleading.

9. TRIAL, § 204*—*when verdict properly directed.* Where defendant offers no evidence and plaintiff's evidence establishes his claim, it is proper to direct a verdict for plaintiff for the amount claimed.

10. APPEAL AND ERROR, § 1523*—*when verdict not reversed on appeal.* Where defendant offers no evidence and plaintiff's evidence establishes his claim, a court of review will not reverse although there were errors in instructions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Max Glabman, Plaintiff in Error.

Gen. No. 21,762.

1. HUSBAND AND WIFE, § 274*—*when State need not prove that wife at time of abandonment was "in destitute or necessitous circumstances."* Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), providing that "every person who shall without good cause abandon his wife and neglect and refuse to maintain and provide for her, or who shall abandon his or her minor child or children under the age of 12 years, in destitute or necessitous circumstances," shall be guilty of a misdemeanor, does not require the State to prove, in order to obtain a conviction for wife abandonment under the statute, that at the time of the abandonment charged the wife was in "destitute or necessitous circumstances," the statute being disjunctive, providing two classes of cases, the abandonment of the wife and the abandonment of the children, so that the words "in destitute and necessitous circumstances" apply only to the second class of cases, leaving the first class to consist of abandonment of the wife without good cause, and refusing and neglecting to provide for her.

2. HUSBAND AND WIFE, § 272*—*statute on wife abandonment not retroactive.* The Act of 1915 providing that every person who shall, without any reasonable cause, neglect or refuse to provide for the support of his wife, said wife being in destitute or necessitous circumstances, shall be guilty of a misdemeanor, has no retroactive effect and cannot apply to a prosecution for a similar misdemeanor commenced before the act went into effect.

3. STATUTES, § 252*—*when criminal statutes not retroactive.* In a criminal case a conviction must be measured by the statute as it existed when the information was filed.

4. HUSBAND AND WIFE, § 272*—*what are elements of offense of wife abandonment.* Under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), the elements necessary to a conviction are abandonment of the wife and neglect and refusal to maintain her.

5. HUSBAND AND WIFE, § 275*—*when judgment of conviction for wife abandonment sustained.* A conviction is proper in an information charging defendant with wife abandonment, under Hurd's Rev. St., ch. 68, sec. 24 (J. & A. ¶ 3431), where the information charges all which is necessary to constitute the crime alleged under the statute then in force and where the evidence sustains the charge in the information.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 17, 1916.

RODERICK & RODEBICK, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiff in error was convicted under an information filed October 9, 1914, charging him with wife abandonment. The charge was that plaintiff in error wrongfully and without good cause abandoned his wife and neglected and refuses to maintain and provide for her. The information was in the terms of the statute then in force, being section 24, ch. 68, Rev. St. (J. & A. ¶ 3431). This conviction is before us for review.

Plaintiff in error contends that it was necessary for the State to allege and prove that his wife was "in destitute or necessitous circumstances," and cites *People v. Bos*, 162 Ill. App. 454, as sustaining authority. The statute cited in the *Bos* case, *supra*, is the same as that under which Glabman was convicted. That statute provides for two classes of cases, one the abandonment of the wife and the other the abandonment of children. The statute is in the disjunctive, and reads as to the wife, "every person who shall without good cause abandon his wife and neglect and refuse to maintain and provide for her," and as to the children continues, "or who shall abandon his or her minor child or children under the age of 12 years, in destitute or necessitous circumstances." The leaving "in destitute or necessitous circumstances" applies to the abandonment of child or children, and the abandoning of the wife and the refusing and neglecting to provide

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for her without good cause constitute the crime of wife abandonment under the Act of 1903.

The *Bos* case, *supra*, is not binding upon us on this review, and as it was not in our opinion well decided it has no appealing force. The Act of 1915, which does require that the wife be in necessitous or destitute circumstances to constitute the crime of abandonment, has no application to Glabman's prosecution, as it has no retroactive effect. Glabman's conviction must be measured by the statute as it existed at the time the information was filed.

The *People v. Heise*, 257 Ill. 443, governs this case. In that case it was held that to constitute the crime of wife abandonment three things must concur—abandonment of the wife, and neglect and refusal to maintain her. The information charged all that was necessary to constitute the crime of wife abandonment under the statute then in force, and the proof sustaining the charge in the information, the trial Judge rightfully convicted Glabman.

The judgment of the Municipal Court being without error, is affirmed.

Affirmed.

In the Matter of the Estate of Francis A. Barnes, Deceased.

On Appeal of Vilena H. Barnes, Administratrix, Appellant, v. The People of the State of Illinois for use of George Earle et al., Appellees.

Gen. No. 20,301. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Appeal by Vilena H. Barnes, administratrix of the estate of Francis A. Barnes, from an order of the Circuit Court directing her to distribute cash remaining in her hands among the creditors of the estate, in proportion to the amount of their claims.

It appeared that Francis A. Barnes and Samuel M. Parish were copartners, doing business under the firm name of Barnes & Parish, as real estate brokers; that Samuel M. Parish having died, Francis A. Barnes as surviving partner succeeded to the business, and possessed himself of the assets and the good-will thereof, the business thereafter being conducted under the name of F. A. Barnes & Company; that Francis A. Barnes having later died, his widow was appointed administratrix of her deceased husband's estate; that Percy C. Barnes, a son of F. A. Barnes and the appellant, continued the business.

It is maintained by the appellant that Percy C. Barnes became a partner in the business and she claims to have paid him \$350 for his share thereof, including the good-will, which she claims he had succeeded to as surviving partner upon the death of Francis A. Barnes. It further appeared from the evidence that later the appellant, in consideration of \$1,550,

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sold to G. H. Schneider & Company the real estate business of F. A. Barnes & Company, including the good-will.

In reporting said sale to the Probate Court, the appellant accounted only for the sum of \$165.55, which represented the inventoried value of the fixtures and furniture belonging to said real estate business, leaving unaccounted for the sum of \$1,383.45. At this time the said estate of Francis A. Barnes was insolvent to an amount upwards of \$10,000.

Thereafter in the Probate Court of Cook county the appellant was ruled to show cause why she should not account for the said \$1,383.45. Appellant's reply was to the effect that the said sum of \$1,383.45 represented the amount paid by G. H. Schneider & Company for the good-will of the business of F. A. Barnes & Company; that the said good-will sold to G. H. Schneider & Company was her own personal property by purchase from Percy C. Barnes, and had never been vested in the estate.

The Probate Court on hearing allowed appellant credit for the \$350 paid to Percy C. Barnes, which expenditure was approved as a purchase of an outstanding claim in the interest of said estate, and as an expense of administration; and ordered the appellant to account to the estate of said Francis A. Barnes for balance, viz., \$1,033.45. Appellant refused, and failed to account for the aforesaid \$1,033.45, and therefore the Probate Court stated an account for her, showing a credit to the estate of the said \$1,033.45, from which credit and accounting appellant took an appeal to the Circuit Court, where, upon a hearing, the order complained of on this appeal was entered.

After affirmance of the judgment below, a rehearing was granted.

DANIEL S. WENTWORTH, for appellant.

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ADAMS & WENNER, for appellee Lucy A. Salisbury.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 62*—*what constitutes assets of the estate.* Where, in the account of an administratrix, there appears an item showing an expenditure for the purchase of the interest of the deceased's surviving partner in a partnership business owned by the deceased and the seller of such interest, the interest so purchased must be considered as an asset of the estate for the proceeds of the sale of which the administratrix must account, and cannot be considered as her individual property.

2. APPEAL AND ERROR, § 1276*—*when presumed administratrix acquired property in representative capacity.* Where, on there appearing in the account of an administratrix, an item of expenditure for the purchase of an outstanding interest in the estate, and on the administratrix's failure to account for the proceeds of the subsequent sale thereof, the Probate Court states an account for her, crediting the estate with such proceeds and debiting it with the amount expended therefor, from which action she appeals but, being ordered to file a bill of particulars, limits the appeal to an objection as to the credit, thereby acquiescing in the allowance of the debit, it must be considered that she acquired the property in her representative capacity and not as an individual.

3. EXECUTORS AND ADMINISTRATORS, § 119*—*when claim against estate purchased by administratrix inures to benefit of estate.* Where an administratrix uses the funds of the estate in the purchase of a claim against it, the benefits thereof must inure to the estate.

On Rehearing.

EXECUTORS AND ADMINISTRATORS, § 553*—*when administratrix on appeal from an account stated limited to points raised in bill of particulars.* On an appeal from an account stated for her by the Probate Court, an administratrix is limited to a hearing on those points raised in her bill of particulars.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edward J. Jefferys, Defendant in Error, v. James C. Hart, Plaintiff in Error.

Gen. No. 20,476.

1. LANDLORD AND TENANT, § 464*—*when noncompliance of tenant with demand for payment of rent does not terminate lease.* Section 8 of the Landlord and Tenant Act (J. & A. ¶ 7046), providing for demands by landlords for nonpayment of rent by tenants, notifying such tenants that in case of nonpayment within five days the lease will be terminated, and further providing that "if the tenant shall not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended," does not of necessity terminate the lease on the noncompliance by the tenant with the demand, but merely gives to the landlord the right to consider the lease ended, or in force, at his option, the words "may consider the lease ended" presupposing the existence of the lease, and such words being superfluous if the intention of the Legislature was to terminate the tenancy by serving a five-day notice.

2. LANDLORD AND TENANT, § 464*—*how statute relative to termination of lease by landlord construed.* If section 8 of the Landlord and Tenant Act (J. & A. ¶ 7046) were construed as terminating the lease on the noncompliance by the tenant with a notice under the statute, such construction would enable the tenant to forfeit the lease by committing a breach requiring the notice, and thereby take advantage of his own wrong, which forfeiture would be no more favored by the law than a forfeiture by the landlord against the tenant.

3. LANDLORD AND TENANT, § 464*—*what constitutes exercise of option by landlord under statute to terminate lease.* After the service by a landlord on a tenant of notice and demand under section 8 of the Landlord and Tenant Act (J. & A. ¶ 7046), which is not complied with by the tenant, the action of the landlord in bringing either forcible detainer proceedings or ejectment would be an affirmative act showing his intention to exercise his option under the statute to consider the lease as ended.

4. LANDLORD AND TENANT, § 456*—*what constitutes an abandonment by tenant.* A tenant on whom a notice and demand has been served by the landlord under section 8 of the Landlord and Tenant Act (J. & A. ¶ 7046) has no right to consider his lease as terminated prior to some affirmative act showing an election by the landlord so to treat the lease, and a vacation of the leased premises prior to such affirmative act is an abandonment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed January 27, 1916.

Statement by the Court. Defendant in error (plaintiff below) sued plaintiff in error (defendant below) for the recovery of money alleged to be due on a deposit under a lease between the parties. The court upon a trial of the case without a jury found the issues against the defendant, assessing plaintiff's damages in the sum of \$270.65 for which amount and costs, judgment was entered, to reverse which defendant has sued out this writ of error.

WILLIAM J. AMMEN, for plaintiff in error.

LOUIS J. PIERSON, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Under a lease dated June 25, 1913, defendant rented to plaintiff the store on the first floor of the building known as 5547 South Halsted street, Chicago, Illinois, from July 1, 1913, until April 30, 1918, at a monthly rental of \$50 for the first twenty-two months of said lease and \$55 for the remainder of the term, which rent was payable in advance upon the first day of every month of said term.

Said lease also contained the following clause:

"It is expressly understood and agreed that said lessee shall pay to said lessor, upon the execution of this lease, the sum of Three Hundred (\$300.00) to be by him held to secure the payment of said rent and the performance by said lessee of his obligations hereunder; and in case said lessee, on November 1st, 1917, shall have paid to said lessor all rent theretofore due and shall have performed all the other obligations herein set out to be by him performed and shall also

Jefferys v. Hart, 197 Ill. App. 514.

pay to the said lessor the further sum of Thirty Dollars, then said payment of Three Hundred Dollars shall be held by the said lessor as a balance of the rent for the final six months of said term and said lessee credited accordingly.

"It is further understood and agreed that the giving and acceptance of said sum of three hundred dollars, as security, as aforesaid shall in no manner or degree effect or alter any right of action hereunder which said lessor might otherwise have against said lessee."

Plaintiff not having paid the rent due October 1, 1913, defendant served the following notice on him:

"Chicago, Ill., Oct. 16, 1913.

"To Edwin J. Jeffery:

"You are hereby notified that there is now due the sum of Fifty Dollars being rent due for the premises situated in the city of Chicago, County of Cook, and State of Illinois, and known and described as follows, viz., the store on the first floor of the building at No. 5547 So. Halsted street.

"And you are further notified that payment of said sum so due, has been and is hereby demanded of you, and that unless payment thereof is made on or before the 21st day of October, A. D. 1913, your lease of said premises will be terminated. * * * at * * * is hereby authorized to receive said rent for me.

(Signed) JAMES C. HART,

Landlord,

By C. D. EULETTE,

Agent."

The foregoing facts are uncontradicted. There is, however, a conflict in the evidence as to what took place after defendant served the aforesaid notice.

Plaintiff introduced evidence that on October 21, 1913,—five days after he received the notice—he vacated said premises and turned over the key to a person duly authorized to receive same by defendant, and that he tendered the sum of \$33.88 to defendant for rental of the premises for twenty-one days in October, which, however, was refused.

Defendant introduced evidence that plaintiff did not vacate the premises until either the 26th or 27th of October, 1913, and that the keys were not delivered until the 28th or 29th of October; and also offered evidence to show that after the vacation of said premises by plaintiff on the 26th or 27th of the month, he re-entered the premises for the purpose of putting them in shape to rent to the best possible advantage, as he claimed was his duty under the law; that the premises remained vacant until the first of March, 1914; that the damages sustained by him by reason of the abandonment of the premises by plaintiff exceeded the \$300 deposited with defendant under the lease as security for the faithful performance of the terms thereof.

Upon this record, plaintiff claims that by the serving of the aforesaid notice, under the provisions of section 8 of our Landlord & Tenant Act, ch. 80 of Hurd's Rev. St. of Illinois for 1911 (J. & A. ¶ 7046), plaintiff not having paid the rent within five days as required in said notice, the lease was terminated; that because of the termination of said lease, he was entitled to the return of the \$300 deposited under the clause hereinabove set forth, less the amount tendered as the rent due for the use of said premises for the twenty-one days in October that the premises were occupied by him.

Defendant contends that said lease was not thereby terminated, but that plaintiff abandoned the premises demised under said lease, and that by reason of such abandonment, defendant sustained damages in a sum greater than the amount deposited as security for the faithful performance of the covenants in the lease.

If the foregoing facts established a termination of the lease, then the judgment of the Municipal Court must be affirmed; if not, we must reverse it.

If the position of plaintiff is tenable, then the mere serving of the five-day notice, followed by plaintiff's

noncompliance therewith, constituted a termination of the lease.

Section 8 of our Landlord & Tenant Act (J. & A. ¶ 7046) provides as follows:

“Demand of rent—Suit for possession—Joinder of claim for rent in complaint. That a landlord or his agent may, at any time after rent is due, demand payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than five days after service thereof, the lease will be terminated. If the tenant shall not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute in relation of (to) forcible entry and detainer, or maintain ejectment without further notice or demand. And a claim for rent may be joined in the complaint, and judgment obtained for the amount of rent found due, in any action or proceeding brought, in an action of forcible entry and detainer for the possession of the demised premises, under this section.”

Under the facts in evidence, plaintiff defaulted in the payment of the rent due October 1st. The landlord, therefore, as provided under section 8 *supra*, notified the tenant that unless the rent was paid within five days, the lease would be terminated; but section 8 does not provide that the serving of such notice shall itself constitute a termination, for that section provides:

“If the tenant shall not within the time mentioned in such notice, pay the rent due, the landlord *may consider the lease ended*, and sue for the possession under the statute in relation of (to) forcible entry and detainer, or maintain ejectment without further notice or demand.”

In our opinion, the words “may consider the lease ended” necessarily presuppose the existence of the lease, after the serving of the five-day notice,—or why would they be there? If the intention of the Legislature was to terminate the tenancy by the serving of a

five-day notice, the words "may consider the lease ended" are superfluous. We believe these words were inserted for a purpose, and for but one purpose, viz., to indicate that it is optional with the landlord, after serving a five-day notice, to consider the lease still in force, or ended, as he sees fit.

Plaintiff had committed a breach of one of the covenants of the lease. The landlord had called his attention to the breach and warned him, by serving said notice, that unless said breach was corrected, he (the landlord) could consider the lease ended.

Under the contention of the plaintiff, not only could the tenant commit a breach, but he could use that breach to compel a forfeiture, thereby taking advantage of his own wrong. Such a forfeiture is no more favored in law than is a forfeiture by the landlord against the tenant.

In support of his contention, plaintiff cites *Wm. J. Lemp Brewing Co. v. Lonergan*, 72 Ill. App. 223. This case, however, refers to *Dickenson v. Petrie*, 38 Ill. App. 155, as holding to the contrary.

After a careful examination of section 8 of our Landlord and Tenant Act, *supra*, we are impelled to adopt the reasoning set forth in *Dickenson v. Petrie*, *supra*, and to hold that under said section it is the privilege of the landlord, after serving the five-day notice followed by the tenant's noncompliance, to say whether or not he wishes to forfeit the lease, and to bring forcible entry and detainer proceedings or an action in ejectment. His election to do either would be an affirmative act showing that he considered the lease ended. Until an act is performed by the landlord in pursuance to said notice, which could be regarded as an election to consider the tenancy ended, the tenant has no right to vacate the premises; therefore, the act of plaintiff in vacating the premises, whether he did so on October 21st or later, must be regarded as an abandonment thereof.

Voelkner v. Ott, 197 Ill. App. 520.

In this view of the case, the only question that remains for the court to determine is whether or not the damages sustained by defendant because of said abandonment were greater than the amount deposited by plaintiff with defendant to secure the faithful performance of the covenants of the lease.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed.

Reversed and remanded.

Augusta Voelkner, Plaintiff in Error, v. Louis A. Ott et al., Defendants in Error.

Gen. No. 20,524. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by Augusta Voelkner, plaintiff, against Louis A. Ott, Mabel C. Ott, Henry Shrik and Lucy Shrik, defendants, in the Municipal Court of Chicago, to recover on a promissory note. To reverse a judgment for defendants, plaintiff prosecutes this writ of error.

On July 18, 1911, the Shriks owned certain realty, upon which a loan of \$3,000 was negotiated by John P. Foerster & Company, mortgage bankers. The Shriks executed a principal promissory note of \$3,000, due in five years, with interest semiannually at six per cent. per annum, and evidenced by ten in-

terest notes or coupons. All were made payable to and indorsed by the makers, and provided that unless otherwise specified in writing by the holder, they should be payable at the office of John P. Foerster & Company, Chicago.

On May 16, 1912, the Shriks sold the real estate to the Otts, subject to the incumbrance of \$3,000.

The evidence further showed that during December, 1913, the Shriks received notice from John P. Foerster & Company that interest coupon No. 5 for \$90 would be due January 18, 1914; that on January 6, 1914, one Thies, a brother-in-law of defendant Louis Ott, paid the cashier of John P. Foerster & Company \$90 to take up the interest coupon; that the cashier stated that the note had not yet been received, but he gave him a receipt in the following form:

"No. 468.

Chicago, Jan. 6, 1914.

"Received of Louis A. Ott, \$90.00 in payment of his interest coupon due January 18, 1914, same to be cancelled and mailed as soon as received by us.

JOHN P. FOERSTER & Co.,

By U. M. FOERSTER."

that on January 9, 1912, John P. Foerster & Company were forced into involuntary bankruptcy and did not pay the \$90 to plaintiff; that the interest coupon, at the time payment was made by the Otts, and since then, was in possession of the plaintiff.

The evidence further showed that prior to this payment, four other interest coupons had matured and were paid to John P. Foerster & Company in a similar manner. All of said interest coupons were stamped across the face with the words, "Paid, John P. Foerster & Company," and the respective dates upon which payments were made.

It also appeared that counsel for the plaintiff were also counsel for John P. Foerster & Company in the bankruptcy proceedings, and that the claim of plaintiff's, based upon this same interest coupon, was proved in bankruptcy.

Voelkner v. Ott, 197 Ill. App. 520.

The case was tried by the court without a jury, and the court found for defendant.

CASWELL & HEALY, for plaintiff in error.

FRANK F. TOLLKUEHN, for defendants in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 134*—*when agent no authority to receive payment of debt before maturity.* Authority to an agent to receive payment of a debt is not of itself authority to receive payment thereof before maturity.

2. PRINCIPAL AND AGENT, § 134*—*when usage validates act of agent in receiving payment of debt before maturity.* Where a known usage of trade or course of business in a particular employment extends the ordinary scope of the authority of one authorized to receive payment of a debt, such usage or course of business may be held to give validity to the act of such agent in receiving payment of the debt before maturity.

3. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to sustain finding that payment of note made to duly authorized agents.* In an action to recover on an interest coupon note which was paid to brokers, evidence held sufficient to sustain a finding that payment was made to duly authorized agents of the plaintiff.

4. BILLS AND NOTES, § 378*—*when possession of notes by holder merely presumptive evidence of nonpayment.* The possession of notes by the holder is merely presumptive and not controlling evidence of their nonpayment, and such evidence may always be overcome by clear proof that the notes were in fact paid to a person having authority to receive payment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jennie Sargent, Defendant in Error, v. McDonough & Company, Plaintiff in Error.**Gen. No. 20,683. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LABUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by Jennie Sargent, plaintiff, against McDonough & Company, a corporation, defendant, in the Municipal Court of Chicago, to recover money loaned. To reverse a judgment for plaintiff for \$200, defendant prosecutes this writ of error.

Defendant is an Illinois corporation, having a capital stock of twenty-five shares, twenty-three of which were in the name of and owned by C. O. Garmire, one in the name of Elizabeth Garmire, and one in the name of one Young. In November, 1911, C. O. Garmire went to Portland, Oregon. The defendant was engaged in the publication of professional directories, and in November, 1911, was particularly engaged in publishing an architects' directory. It appears that Young was in charge of this work. It does not appear whether Young had a contract as to this publication, or, if so, what its terms were, save that in a letter by Garmire to his wife, dated March 4, 1912, he stated that Young was to pay all bills in connection with the publication, then pay \$1,000 to the company, and that thereafter Young would be entitled to the entire proceeds of said directory. In this letter Garmire also directed his wife to receive all collections and to take charge of the office in general. In this letter it was also stated that Young was president, Garmire secretary and treasurer, and Mrs. Garmire vice-president.

On April 28th Garmire wrote his wife a letter, in the main directed to the publication of this architects' directory and Young's connection therewith. In this letter, Garmire said:

"I want to know what Young is doing. If nothing you better use the money there and send out solicitors for advertising don't pay over 25% and be careful of bad orders."

It further appeared that Mrs. Garmire continued in charge of the business and sent out solicitors as requested. She testified that she borrowed from plaintiff (her mother) the sum of \$100 on October 8th, and a similar sum on November 26th which was used to pay the solicitors engaged in the interest of this architects' publication.

Plaintiff testified that she loaned this money to the defendant at the request of Mrs. Garmire, and that it was used for its benefit.

It appeared that all money received for defendant, after the letter of March 4th was deposited in the name of Garmire, and that no entries were made on the books of the defendant of the money claimed to have been borrowed by Mrs. Garmire from plaintiff, for use of the defendant.

Defendant, on its behalf, offered the deposition of Garmire taken in Portland, wherein Garmire stated that Mrs. Garmire was not authorized to borrow money for the company; and that the money borrowed from plaintiff was for his own benefit, and was deposited to meet checks drawn by him in Portland. He did, however, admit that this money was advanced by plaintiff to his wife; that he wrote Mrs. Garmire to look after the business and "get some solicitors and put them out on the Architects, one of the books published by this company."

D. G. Brennan testified for defendant that he was secretary and treasurer of defendant; that in May, 1913, Mrs. Garmire stated to him that she had a claim

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for \$200 against Garmire personally but not a claim against the company, and inquired whether all money had been paid to Garmire, saying that she hoped that all money had not been paid to Garmire so she could attach.

Mrs. Garmire testified that she told Brennan the claim was against the defendant and asked payment of it.

The case was tried by the court without a jury and the issues were found for plaintiff.

MILLS & HOLLY, for plaintiff in error.

BROWN, BROWN & BROWN, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 295*—*when erroneous refusal to hold propositions of law not available as error.* The erroneous refusal to hold propositions of law cannot be availed of as error where it appears that the propositions refused were submitted after the entry of findings and judgment.

2. APPEAL AND ERROR, § 1065*—*when assignment of error raises question of sufficiency of evidence to sustain findings and judgment.* An assignment of error that the court erred in finding for plaintiff in a case heard without a jury goes only to the question whether on the evidence the court was warranted in so finding the issues and in entering judgment thereon.

3. CORPORATIONS, § 516*—*when evidence sufficient to sustain finding that money was borrowed by officer for corporation.* In an action against a corporation to recover money borrowed for its use by one of its officers, where the defense was that the money was borrowed for the personal use of another officer thereof who was also its principal stockholder, a finding for plaintiff is warranted where there is evidence that such principal stockholder suggested to the officer borrowing the money that she borrow money to send out solicitors to secure advertising contracts for a publication published by defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sargent v. McDonough & Co., 197 Ill. App. 523.

4. CORPORATIONS, § 266*—*when creditors' rights not affected by depositing of corporate funds in name of officer of corporation.* The action of an officer of a corporation in closing out the corporation's bank account and depositing corporation funds to the personal account of another officer thereof merely affects the internal management of the corporation and does not affect the rights of its creditors.

5. CORPORATIONS, § 516*—*what weight given to fact that officer made no entry of alleged loan on corporate books.* In an action against a corporation to recover money borrowed by an officer thereof for its use, and where the defense is that such officer had no authority to borrow money for the corporation, the fact that such officer made no entry of the transaction on the books of the corporation is a material but not a controlling fact which should be taken into consideration in determining the issues.

6. CORPORATIONS, § 369*—*when liable for money borrowed by officer without authority.* Where a corporation has had the use of money borrowed for the purpose of paying its expenses, it is liable for its repayment although borrowed by one having no authority to borrow it.

7. CORPORATIONS, § 516*—*what weight given to affidavit by seller of stock regarding amount of indebtedness as against creditors.* Where one buying a controlling interest in the stock of a corporation takes an affidavit from his vendor as to the amount of outstanding indebtedness of the corporation at the time of the sale of the stock, such affidavit is not available as against creditors unless such creditors had knowledge thereof, and then only as a material but not controlling circumstance affecting the issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Elizabeth Garmire, Defendant in Error, v. McDonough & Company, Plaintiff in Error.**Gen. No. 20,682. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LABUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed January 27, 1916.

Statement of the Case.

Action by Elizabeth Garmire, plaintiff, against McDonough & Company, a corporation, defendant, in the Municipal Court of Chicago, to recover for services alleged to have been performed in its behalf. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

This action arose out of the same transaction as *Sargent v. McDonough & Co.*, ante, p. 523, where the facts are more fully stated.

It appeared that plaintiff was the wife of C. O. Garmire, former secretary and treasurer of the defendant company, and owner of twenty-four of the twenty-five shares of its stock. One share seems to have been in the name of the plaintiff, but it appeared to have been the property of her husband. Garmire had undertaken to publish an architects' directory, and up to the time when plaintiff's services are alleged to have begun, the work was being carried on by or through the defendant. The president, Mr. Young, was at that time in charge of the proposed directory, and all moneys collected were deposited to the credit of the defendant. Garmire, who was in Portland, Oregon, wrote the plaintiff in March, 1912, instructing her to take charge of the directory, receive all mail, attend to all correspondence, receive all money and pay it out, and to discharge Young if he objected. Garmire assured plaintiff that she could do this by calling a meeting of

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the company and voting his twenty-four shares of stock. Plaintiff thereupon took charge of the directory, closed out the defendant's bank account, deposited all moneys received to the private account of Garmire, from March 4, 1912, to December 24, 1912. She also testified that all moneys received were used either by her husband or herself, and that while she had charge of whatever books there were, she never made entries indicating that she was employed by the company. The plaintiff acted under the authority of Garmire alone. The evidence did not disclose any authority in him to employ any one on behalf of the company. The record further disclosed that the plaintiff at all times acted as agent for Garmire personally, and alone.

In March, 1913, the stock of the defendant owned by plaintiff's husband was purchased by a third party, who did not know and could not have known that plaintiff had any claims against defendant.

MILLS & HOLLY, for plaintiff in error.

BROWN, BROWN & BROWN, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 173*—*when owner of majority of stock may not hire employees.* In an action against a corporation to recover for services rendered to it, where it appeared that plaintiff was engaged to perform the services sued for by one owning all but one share of defendant's stock, but had no other authority, *held* that plaintiff was not hired by any one having legal authority to represent defendant.

2. CORPORATIONS, § 471*—*when recovery only on implied contract of employment.* A recovery for services rendered to a corporation without being hired to perform such services by a person having legal authority to represent the corporation can only be had on an implied contract for work done for its benefit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. CORPORATIONS, § 363*—*when third person affected by acts done in management of corporation without authority.* The rule that third persons dealing with a corporation without knowledge of its internal management are not affected by acts done in such management, although without authority, has no application to a case where the action is for services alleged to have been rendered to the corporation by a plaintiff who was engaged to perform such services by one owning all but one share of the stock of the corporation, plaintiff having no other authority, and who, in rendering such services, conducts the business of the corporation as the private business of such stockholder.

4. ASSUMPSIT, § 1*—*what is nature of action of.* In actions of *indebitatus assumpsit* the law invokes the fiction of an implied promise on equitable grounds to promote the ends of justice.

5. ASSUMPSIT, § 6*—*when does not lie against corporation.* No promise by a corporation can be implied to pay for services as a basis for an action of *indebitatus assumpsit* rendered to it by a plaintiff who was employed to render such services by one owning all but one share of the stock of such corporation, plaintiff having no other authority, where in rendering such services plaintiff conducted the business of such corporation as the private business of such stockholder.

6. CORPORATIONS, § 363*—*when not liable on unauthorized contract by stockholder.* No legal or equitable grounds exist on which to support a judgment against a corporation for services rendered to it by a plaintiff who was engaged to perform such services by one owning all but one share of the stock of such corporation, plaintiff having no other authority, where in performing such services plaintiff conducted the business of such corporation as the private business of such stockholder.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pratt v. Pratt, 197 Ill. App. 530.

Rose Martin Pratt, Appellee, v. John Pratt, Jr., Appellant.

Gen. No. 20,917. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Bill for separate maintenance by Rose Martin Pratt, complainant, against John Pratt, Jr., defendant, in the Superior Court of Cook county. From a decree granting the relief sought, defendant appeals.

The parties to this suit were married on the 26th day of October, 1912, and lived together until the 23rd day of February, 1913.

The amended bill upon which the decree is based was filed October 2, 1913, and alleged that complainant at all times, while living with her husband, faithfully discharged her duties as wife and treated defendant with kindness and consideration; that defendant at no time provided for complainant a proper home, but soon suggested that they live apart, and provided a room in the home of defendant's parents; that while living there, defendant treated her with disrespect and without the consideration due a wife, and at all times completely ignored her, refusing to speak to her; that defendant's acts while complainant was living with him as his wife were unendurable and a menace to her health, compelling her to leave him on the 23rd of February, 1913, and that up to the filing of this bill she has lived separate and apart from him; that when she informed defendant she intended to leave him he stated that he was satisfied she should go at once; that thereafter she endeavored to work, but owing to poor health could not continue; that she repeatedly went to the

home of defendant and requested him to permit her to return and live with him and to provide her with a home, but defendant refused. Then followed allegations that complainant was physically unable to continue work, that she was without funds or means of support.

Defendant in his answer categorically denied all the charges. On a final hearing a decree was entered finding that complainant was entitled to the relief sought, with thirty dollars per month alimony and fifty dollars solicitor's fees.

CHARLES S. WHARTON, for appellant.

ERWIN McDOWELL, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 217*—*what proof necessary to maintain bill for separate maintenance.* In order to maintain a bill for separate maintenance, it is necessary to show that complainant was living separate and apart from her husband at the time the bill was filed, without fault on her part.

2. HUSBAND AND WIFE—*what rules of evidence inapplicable to proceeding under Separate Maintenance Act.* The rules as to the evidence necessary in order to obtain a divorce do not apply to a proceeding under the Separate Maintenance Act (J. & A. ¶ 6159 *et seq.*).

3. HUSBAND AND WIFE, § 268*—*when wife not required to live with husband.* While a wife is not permitted to leave her husband because of incompatibility or trivial difficulties, she is not required to live with him if guilty of conduct endangering her health or making married life miserable or unendurable.

4. HUSBAND AND WIFE, § 216*—*how word "fault" in Separate Maintenance Act construed.* The word "fault" as used in section 1 of the Separate Maintenance Act (J. & A. ¶ 6159) means a voluntary consenting to the separation of the husband and wife, or such failure of duty or misconduct on the part of the wife as "materially contributes to the disruption of the marital relation."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. HUSBAND AND WIFE, § 217*—*when wife living separate and apart from husband without fault on her part.* Even though a wife leaves her husband without being warranted in doing so, yet if afterwards she requests to be permitted to return and live with him, and he refuses, the wife is thereafter considered as living separate and apart without fault on her part, within the meaning of section 1 of the Separate Maintenance Act (J. & A. § 6159).

6. HUSBAND AND WIFE, § 264*—*when evidence sufficient to sustain finding that conduct of husband calculated to force wife to leave.* In a bill for separate maintenance, where the evidence was conflicting, but where there was evidence that the home provided by defendant was inadequate and the environment disturbing and unpleasant to complainant, evidence held to warrant an inference that the conduct of defendant was calculated to force complainant to leave him, it also appearing that after leaving defendant complainant frequently requested defendant to permit her to return to his home, but defendant refused.

7. EVIDENCE, § 476*—*when weight not determined by number of witnesses.* The number of witnesses testifying on each side of the case is not alone determinative of the question of the preponderance of the evidence.

8. APPEAL AND ERROR, § 1395*—*when finding in chancery case not reversed on appeal.* The rule applicable to trials by jury, that reversals on the ground that the verdict is against the weight of the evidence are only authorized where the error is clear and palpable, applies equally to findings in cases in chancery where the evidence is conflicting and the witnesses have been examined orally in court.

9. APPEAL AND ERROR, § 1395*—*when finding in chancery case not reversed on appeal.* The rule that a finding in a chancery case, where the evidence is conflicting and the witnesses are examined orally in court, will not be reversed unless clearly and palpably against the weight of the evidence is just, where the evidence believed warrants the decree, since the chancellor has opportunity of observing the witnesses while testifying, and thus has facilities of great importance in determining the weight and credibility of the evidence which are not possessed by a reviewing court.

10. APPEAL AND ERROR, § 1387*—*how court of review may determine whether finding against weight of evidence.* A court of review in determining whether a finding is clearly and manifestly against the weight of the evidence can only follow the words of the witnesses as transcribed in the record, knowing that some of the evidence is always lost in transcription.

11. HUSBAND AND WIFE, § 264*—*when evidence sufficient to sus-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tain finding that wife living apart from husband without fault of her own. In a bill for separate maintenance, where the evidence was conflicting, a decree finding that complainant at the time the bill was filed was living separate and apart without fault of her own, held not clearly and manifestly against the weight of the evidence.

Leopold Nathan, Appellant, v. Harry M. Brown, Appellee.

Gen. No. 20,969. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Bill by Leopold Nathan, complainant, against Harry M. Brown, defendant, in the Superior Court of Cook county, praying for the construction and reformation of a written agreement, for an injunction against the prosecution of certain suits at law, and for other relief. From a decree in favor of defendant, complainant appeals.

The bill alleged that the complainant had been engaged in the real estate business for many years and that in connection therewith he had been conducting a real estate business under the name of Local Improvement and Taxpayers Association (not incorporated); that he had known the defendant prior to July 1, 1908; that on July 23, 1908, complainant and defendant entered into a written partnership agreement, in part as follows, namely:

“The parties have hereby further agreed to engage in the real estate business.

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"On any business done, in real estate transactions and in any other business said firm shall agree to engage in under contracts signed after this date the profits shall be divided by the parties hereto share and share alike.

"All expenses and losses shall be paid by both parties hereto share and share alike.

"The said L. Nathan is to pay any and all debts heretofore contracted by the said Local Improvement Tax Payers Ass'n. The said Harry M. Brown having this day paid to the said L. Nathan the sum of Two Hundred Fifty (\$250.00) Dollars, the receipt of which is hereby acknowledged for an undivided one-half ($\frac{1}{2}$) interest in and to the office fixtures now in said office and owned by the said L. Nathan, and the good will of said business.

"This contract to be in force for a term of three (3) years from this date, unless dissolved by mutual consent."

That afterwards the business was conducted as a copartnership; that the partnership continued until about May 25, 1910, during which time all profits were divided according to agreement; that on May 25, 1910, they agreed in writing to dissolve partnership, as follows:

"DISSOLUTION OF CO-PARTNERSHIP.

"Whereas articles of co-partnership was entered into on the 23rd day of July, 1908, by and between Leopold Nathan and Harry M. Brown; and

"Whereas the said Nathan and Brown have mutually agreed to dissolve this co-partnership by mutual consent:

"It is hereby stipulated and agreed that all the assets of any kind and nature, all outstanding accounts, office fixtures, etc., and the good will of said business shall be the property of said L. Nathan for his own use and behoof forever;

"The said Leopold Nathan agreed to assume and to pay all liabilities of said firm, and for and in consideration of all interests in said firm heretofore owned by the said Harry M. Brown the said L. Nathan hereby

agrees to pay to said Harry M. Brown Twenty-five (\$25) Dollars per week commencing on the 28th day of May, 1910, until the Thirty-first day of December, 1910; the said Harry Brown in lieu of this agreement to give such services as he may be able to give until said last named date.

“Dated at Chicago this 25th day of May, 1910.

LEOPOLD NATHAN,
HARRY M. BROWN.”

The bill further alleged that the defendant, in accordance with the dissolution agreement, was to enter and continue in complainant's employ until December 31, 1910, at a salary of \$25 per week, devoting all his time and energy to the promotion of said business; that the defendant continued in complainant's employ until July 1, 1910, when he was injured, up to which time he was paid a salary of \$25 per week; that thereafter the defendant rendered no service.

The bill further sets forth that in October the defendant brought suit against the complainant in the Municipal Court for the sum of \$350, being the amount alleged to be due from July 1st to October 10th under the dissolution agreement; that on November 9, 1910, the defendant sued out an attachment in aid of his suit at law which he caused to be levied upon the real estate of the complainant, and that the defendant had otherwise attempted to harass and injure complainant in his business and threatened to file additional suits from time to time until complainant should pay him the sum of \$350, and continued to pay him at the further rate of \$25 per week from said October 27th to December 31st, although he had been well able to attend to business had he been so inclined, and that defendant had informed complainant that he did not intend to return or to perform any further service for complainant.

The bill further alleged that the dissolution agreement was ambiguous and capable of more than one construction.

Then followed the prayer that the dissolution agree-

ment be construed so as to express the actual understanding of the parties, and that any and all liabilities of complainant, if any, be adjusted and adjudicated, and asking for any injunction restraining the defendant from further prosecuting the suit brought by him in the Municipal Court of Chicago, and to enjoin him from instituting or prosecuting any further proceedings.

On December 5, 1910, an injunction was issued as prayed. On December 12, 1910, the appearance of the defendant, by his solicitors, was filed and on December 13, 1910, on motion of defendant's solicitors the injunction was dissolved and defendant allowed to file suggestion of damages within five days.

On December 19, 1910, suggestion of damages was filed by the defendant.

On November 1, 1911, defendant filed his answer, by which defendant denied all the allegations in the complaint, save those as to entering into the partnership agreement and also the agreement of the dissolution of said partnership. He admitted further the beginning of the suit in the Municipal Court against complainant and the attachment suit in aid thereof.

To this answer the complainant filed a general replication on October 16, 1913.

On November 22, 1913, a stipulation was entered into that the hearing on the suggestion of damages in said cause be placed on the contested motion calendar for December 13, 1913.

On May 29, 1914, the court entered the following decree:

"This cause having come on to be heard, upon the bill of complaint herein and the answer thereto of the defendant and the stipulation of the parties by their respective solicitors in open court, and the court having heard the evidence, both oral and documentary and the same having been argued by counsel for the respective parties and the court being fully advised in the

premises doth find that it has jurisdiction both of the subject-matter and of the parties, that the said parties had entered into a contract of dissolution as set out in complainant's bill of complaint and that as a result of said contract there is due to the defendant the sum of Three Hundred Fifty (\$350.00) Dollars which includes not only the amount accrued at the date of the filing of the bill herein but all amounts accrued and to accrue thereafter under said contract.

"The court further finds that there is due to defendant for wrongful issuance of writ of injunction herein the further sum of \$100.

"It is therefore ordered, adjudged and decreed that the said defendant do have and recover from the said complainant the sum of \$450 together with all costs which said defendant has paid on account of said cause."

MORTON T. CULVER, for appellant.

BAUER & DONOGHUE, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1347*—*when presumed that no certificate of evidence was filed.* Where on appeal the *præcipe* of the record shows that the clerk was asked to prepare a complete transcript of the record in the cause appealed, and where the clerk certifies that the record presented is as requested in the *præcipe*, it will be presumed that no certificate of evidence was ever filed in the cause, none appearing in such record.

2. EQUITY, § 553*—*when decree sustained.* A decree not supported by findings of fact set forth therein or by a certificate of evidence is none the less properly made if the bill and answer set forth sufficient facts to warrant such decree.

3. PARTNERSHIP, § 74*—*when agreement for dissolution of partnership construed as agreement to pay stipulated sums for interest in business.* An agreement for the dissolution of a partnership

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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providing that all partnership assets were to belong to complainant and all partnership liabilities paid by him and "for and in consideration of all interests in said firm owned by" defendant, complainant "agrees to pay to" defendant "twenty-five (\$25.00) dollars per week" between named dates, defendant to "give such services as he may be able to give until such last named date," *held* to be construed as an agreement to pay the amounts named in consideration of defendant's interest in the partnership, and not as obligating defendant to render services for which he was to be paid \$25 a week.

4. REFORMATION OF INSTRUMENTS, § 2*—*when agreement not ambiguous so as to require reformation.* In a bill to reform a written agreement on the ground that it did not express the true intent of the parties, agreement examined and *held* not to require reformation, on the ground of ambiguity.

5. PARTNERSHIP, § 425*—*when finding sustained by record.* In a bill praying *inter alia* that all liabilities of complainant to defendant as partners be adjusted, where the record showed that complainant made a valid agreement to pay defendant \$25 each week from May 28th to December 31st of a certain year, which agreement was not performed, a finding for defendant for \$350 *held* warranted by the record.

6. APPEAL AND ERROR, § 1258*—*when error in finding not available to complainant.* A complainant in a chancery suit cannot complain that the court erroneously found against him in a less sum than warranted by the record, as such action was favorable to his interest.

7. APPEAL AND ERROR, § 1079*—*when error in finding not available to defendant.* A defendant in a chancery suit in whose favor the court has found in a less sum than warranted by the record cannot complain of the error where such party has not assigned a cross-error.

8. INJUNCTION, § 262*—*when temporary injunction properly dissolved.* A temporary injunction restraining defendant from prosecuting an action at law is properly dissolved where it appears that such action was based on a sufficient cause of action.

9. INJUNCTION, § 386*—*when finding sufficient as basis for decree for damages.* A finding in a final decree that a certain sum was due defendant for the wrongful issuance of an injunction is a sufficient finding of fact on which to base a decree, adding the amount to the amount of defendant's damages, although the record does not show any evidence on which such finding was based, it appearing from the record that the injunction was issued and dissolved and that a suggestion of damages was filed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James A. Hickey, Appellee, v. Edwin L. Reed & Company, Appellant.

Gen. No. 20,254. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LABUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by James A. Hickey, plaintiff, against Edwin L. Reed & Company, defendant, in the Municipal Court of Chicago, to recover on a written contract whereby defendant hired plaintiff to go to Indianapolis to work for a street car company during the continuance of a strike there. To reverse a judgment for plaintiff, defendant prosecutes this writ or error.

The contract provided that he was to receive three dollars a day, board, lodging and transportation. Apparently the men taken to Indianapolis merely reported for work and were ready to take out cars when ordered. It was admitted that plaintiff reported Saturday and Sunday after arriving in Indianapolis. The defendant's assistant superintendent testified that he discharged plaintiff next day, and is corroborated by other employees of the defendant. Plaintiff testified that he reported every day during the strike, and was regularly checked, and is corroborated by one fellow-employee. Defendant's superintendent testified that beginning with Monday, no check mark appeared after plaintiff's name; that a cross was then placed after plaintiff's name, and the notation "open number." The timekeeper testified that an employee was checked when he presented his card; that the sheets offered in evidence were carbons of the originals; that the checks were not put on the sheets before the parties came to the barn; and that where a man did not report, a

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cross was placed after his name. Examination of the carbon sheets showed that plaintiff was regularly checked each day in identically the same manner as other employees. A vertical mark appeared through these check marks, and the notation "open number" appeared in lead pencil. The vertical marks did not appear to be made by an impression through the carbon paper, but to have been made some time after the original entry.

GARDNER, FOOTE & BURNS, for appellant; ORVILLE J. TAYLOR, JR., of counsel.

THOMAS F. DOW, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. *CONTRACTS, § 387*—when evidence sufficient to sustain finding as to performance of contract for personal services.* In an action to recover under a written contract whereby defendant employed plaintiff to go to Indianapolis to work for a street car company during a strike, defendant claimed plaintiff was discharged two days after arriving at Indianapolis, but plaintiff claimed that he reported for work every day during the continuance of the strike and was checked by defendant's timekeeper, and defendant introduced carbon copies of its time sheets which showed that plaintiff was checked each day, as were other employees, but a vertical mark appeared through the check marks on the time sheets and the notation "open number" appeared opposite plaintiff's name in pencil, and examination of the sheets showed that the vertical marks were not made by an impression through the carbon paper but were made some time afterwards, *held* that the sheets tended to corroborate plaintiff's claim.

2. *CONTRACTS, § 384*—when evidence sufficient to sustain judgment for expenses incurred under contract.* In an action to recover on a written contract whereby defendant employed plaintiff to go to a distant city to work for a street car company during a strike, such contract providing that plaintiff should receive board, lodging

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and transportation in addition to his wages, a judgment for plaintiff for the expense incurred in furnishing his own board and lodging while working under the contract held not manifestly against the weight of the evidence, which was conflicting as to whether defendant furnished suitable board and lodging as required by the contract.

3. EVIDENCE, § 139*—*when parol evidence admissible to show terms of written contract not produced.* It is not error to admit parol evidence of the terms of a written contract in the possession of defendant where proper notice was served to produce it at the trial, and where at the time of the admission of the parol evidence such notice had not been complied with.

**Albert Lang, Individually and as Trustee, Appellee,
v. Jane A. Pettis et al., on appeal of William Pet-
tis, Appellant.**

Gen. No. 21,849.

1. APPEAL AND ERROR, § 1751*—*when copies of record of judgment must be filed to prevent affirmance of judgment or dismissal of appeal.* Section 100 of the Practice Act (J. & A. ¶ 8637), providing that where on appeal copies of the record of judgment are not filed as required by the section the judgment appealed from shall be affirmed or the appeal dismissed on the filing by appellee of the certificate of the clerk, applies exclusively to appeals from final judgments and has no application or reference to appeals from interlocutory orders or decrees.

2. APPEAL AND ERROR, § 270*—*how appeals from interlocutory orders or decrees governed.* Appeals from interlocutory orders or decrees are exclusively governed by section 123 of the Practice Act (J. & A. ¶ 8661).

3. APPEAL AND ERROR—*when short record filed by appellee as basis for motion to dismiss appeal will be stricken.* A short record filed by appellee in the Appellate Court for the purpose of moving to dismiss the appeal will be stricken, whether the decree appealed from be interlocutory or final, where it appears that the short record was filed before the expiration of the time allowed for perfecting an appeal from a final judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lang v. Pettis, 197 Ill. App. 541.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Appellee's short record stricken from the docket. Opinion filed January 27, 1916.

WILLIAM PETTIS and CHARLES A. FITCH, for appellant.

ELLIS & LEWIS, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This matter comes up on the motion of appellee to dismiss this appeal for failure to file a complete record in apt time. It appears from the short record filed that an order was entered in the Circuit Court of Cook county on the chancery side in a cause entitled, "*Albert Lang, Individually and as Trustee, vs. Jane A. Pettis, et al.*," by which it was decreed that the defendant, William Pettis, vacate a portion of the premises involved in the cause, and that a writ of assistance be entered forthwith directed to the sheriff, commanding him to oust said Pettis, and place the receiver in possession thereof, from which order said William Pettis appealed to this court; that on the 24th day of March, said Pettis filed his appeal bond. October 1, 1915, this short record was filed by the appellee for the purpose of moving the dismissal of the appeal on the ground that it was an interlocutory appeal, and no complete record had been filed in this court within the sixty days allowed by the statute. There is a fatal objection to appellee's motion. There is no provision in the statute which permits the filing of a short record for the purpose of dismissing an appeal, except in case of failure to file copies of records of judgments, orders and decrees appealed from within the time prescribed by section 100 of the Practice Act (J. & A. ¶ 8637), which relates exclusive-

ly to appeals from final judgments. The language of the provision is very explicit: "If copies of the record of judgments, orders and decrees appealed from shall not be filed within the time above allowed" (i. e. by the second day of the appropriate term), "and appellees shall thereafter file in said Supreme or Appellate Court, as the case may be, the certificate of the clerk, * * * the court shall affirm the judgment or dismiss the appeal as for want of prosecution."

This provision by its terms refers exclusively to appeals from final judgments and decrees, and has no application or reference to appeals from interlocutory orders or decrees which are governed by section 123 (J. & A. ¶ 8661). There is, moreover, a very sound reason for the distinction which the Legislature has made. Appeals from final judgments stay the enforcement of the judgment; appeals from interlocutory orders do not. It therefore follows that if an appeal from an interlocutory order is not perfected, the appellee is in no way harmed. If appellee is correct in concluding that the order appealed from was an interlocutory order, there was nothing in the statute which authorized him to file a short record and move the dismissal of the appeal. If, on the other hand, the order appealed from was a final order, appellees' action in filing such short record October 1, 1915, was not justified, because appellant's time to file his record had not then expired. Appellant did, moreover, file his short record on or before the second day of the term, and that cause, No. 21,903, is still undisposed of. The court will, therefore, on its own motion, strike from the docket the short record filed by appellee as No. 21,-849.

Appellees' short record stricken from the docket.

Todd v. Chicago City Railway Co., 197 Ill. App. 544.

A. M. Todd, Defendant in Error, v. Chicago City Railway Company, Defendant in Error. Auto Taxicab Company, Plaintiff in Error.

Gen. No. 20,440. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916. Rehearing denied February 9, 1916.

Statement of the Case.

Action by A. M. Todd, plaintiff, against the Chicago City Railway Company and the Auto Taxicab Company, defendants, in the Circuit Court of Cook county, to recover for personal injuries. To reverse a judgment for plaintiff, defendant Auto Taxicab Company prosecutes this writ of error.

About midnight, September 11, 1911, plaintiff entered a taxicab of the defendant Auto Taxicab Company at the Illinois Athletic Club in Chicago, and instructed the driver to take him to the Lake Shore station. The driver proceeded south on Michigan avenue, and then turned west on Jackson boulevard. While crossing State street, two blocks west of Michigan avenue, the taxicab collided with a southbound street car. The plaintiff was cut about the head, severing an artery in the region of the temple. He was taken back to the Athletic Club, where he received medical attention. He stayed at the club that night, the next day and night, and the next day, against the advice of his physician, he went to Atlantic City, and later came back to Chicago. He was a traveling salesman earning more than \$10,000 per year. He was unable to work for more than three months after the accident.

The action was tried by jury which found the Chicago City Railway Company not guilty, and returned

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a verdict against the other defendant. In the Appellate Court the death of plaintiff was suggested and his administrator was there substituted on motion.

LEBOSKY & GLADSTONE, for plaintiff in error.

HENRY M. HAGAN, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when instruction on case to be exercised by taxicab company in conveyance of passengers erroneous.* In an action to recover for personal injuries sustained while riding in defendant's taxicab as a result of the collision between it and a street car, an instruction that the driver of the taxicab is not required to anticipate anything not reasonably to be anticipated by him is properly refused, the driver being required in such case, with reference to his passenger, to exercise a high degree of care in safeguarding such passenger, and it is not enough that at the time of the collision the driver was in the exercise of ordinary care.

2. NEGLIGENCE, § 218*—*when instruction properly refused as assuming facts.* In an action to recover for personal injuries it is proper to refuse an instruction that plaintiff could not recover for injury or disability resulting from want of proper care after his injury which aggravated his condition by failing to observe the instructions of his physician, such instruction being bad as assuming that plaintiff had done something aggravating his condition, thereby invading the province of the jury.

3. AUTOMOBILES AND GARAGES, § 3*—*when instruction as to right of driver of taxicab to assume that street car would stop erroneous.* In an action to recover for personal injuries sustained while riding in defendant's taxicab as a result of a collision between the taxicab and a street car, it is proper to refuse an instruction that the driver had a right to assume that the street car would stop as required by an ordinance but not adding "in the absence of some warning or evidence to the contrary," such qualification being necessary to correctness of the instruction.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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4. TRIAL, § 91*—*when objection to evidence limited to grounds specified.* A question to a medical expert objected to in the trial court on the ground that it was not a proper hypothetical question cannot be objected to on the review as calling for an answer invading the province of the jury, an objection to evidence being limited to the grounds specified and not covering other grounds not specified.

5. APPEAL AND ERROR, § 384*—*when objection cannot be made on review.* An objection cannot be made for the first time on review.

6. EVIDENCE, § 410*—*when expert may give opinion whether injured person's condition result of injury.* Where there is no dispute as to the manner in which plaintiff was injured, and the question is whether plaintiff's condition at a subsequent time was the result of the injury, a question to a medical expert calling for an opinion on such question and an answer giving such opinion are properly permitted.

7. AUTOMOBILES AND GARAGES, § 3*—*when evidence as to observance of ordinance by taxicab driven prior to injury inadmissible.* In an action to recover for personal injuries sustained while riding in defendant's taxicab as a result of a collision between the taxicab and a street car, evidence of the practice of the driver of the taxicab prior to the accident as to observance of an ordinance is properly excluded, the only proper inquiry in such case being what the driver did at the time and place of the accident, and it being immaterial what he did at other times.

8. STATUTE OF LIMITATIONS, § 108*—*when must be pleaded to be available as defense.* A defendant who does not plead the statute of limitations to additional counts filed by plaintiff by leave of court cannot complain that such counts set up causes of action differing from that alleged in the original declaration, and that such causes of action are barred by the statute, the only way to raise such question in such case being by a plea of the statute.

9. JUDGMENT, § 216*—*when motion in arrest of judgment not proper to reach defects in declaration.* In an action to recover for personal injuries, a motion in arrest of judgment on the ground that the declaration alleged a higher degree of care to rest on defendant than that required by law is properly denied where defendant requested no instructions embodying its view of the law, the proper method to raise such question being by special demurrer.

10. PLEADING, § 466*—*when declaration sufficient after verdict.* After verdict all that is required is that the declaration be sufficient to sustain a judgment for plaintiff.

11. DAMAGES, § 115*—*when damages for personal injuries not excessive.* In an action to recover for personal injuries, where it

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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appeared that prior to the accident plaintiff's earnings averaged nearly \$1,000 a month, a verdict for plaintiff for \$2,500 held not excessive, it also appearing that plaintiff was unable to work for more than three months after the accident and suffered great pain.

Dravo Doyle Company, Defendant in Error, v. Sulzberger & Sons Company, Plaintiff in Error.

Gen. No. 20,655. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by the Dravo Doyle Company, a corporation, against Sulzberger & Sons Company, a corporation, defendant, in the Municipal Court of Chicago, to recover a balance due on the purchase price for turbine gears sold and delivered to defendant. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

For some time prior to June, 1912, the defendant operated a steam turbine at its plant in the Chicago stockyards, and purchased from the plaintiff certain gears to be used with the turbine.

It appeared that the gears were ordered in June, 1912, delivered in July, 1912, and installed in defendant's plant. After the gears were in operation from four to six weeks, some of the teeth broke. They were then taken to defendant's machine shop, turned down on a lathe, the broken parts removed and then replaced and used at intervals thereafter. After the break, defendant took the matter up with the plaintiff, the

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defendant claiming that the gears were inherently defective, causing the break, and that the gears should be replaced without cost. The plaintiff contended that the trouble was caused by reason of a faulty foundation on which the turbine was placed. After some controversy, the plaintiff, on August 14, 1912, wrote the defendant a letter in which plaintiff reiterated its belief that the break in the teeth of the gears was due to the foundation on which the turbine rested, and suggested that defendant send the gears to the manufacturer's laboratory for testing, and intimating that if found defective such manufacturer would probably replace them.

In accordance with the letter, the defendant sent the broken parts of the gears to Trenton, New Jersey, and on October 16, 1912, plaintiff wrote to the defendant advising it that after an examination of the broken parts of the gears, there was no evidence of inherent defects, and that therefore no credit or allowance could be made.

The gears in question were manufactured at Trenton, New Jersey, by the DeLaval Steam Turbine Company. There was no express warranty of the gears.

The action was tried by jury, and at the close of all the evidence the court instructed the jury to find for plaintiff.

WILLIAM R. BROWN, for plaintiff in error.

BAKER & HOLDER, for defendant in error; G. RAYMOND COLLINS, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 243*—*when no implied warranty of quality of goods.* There is no implied warranty of the quality of goods sold which are not manufactured by vendor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. SALES, § 252*—*when implied warranty of fitness for purpose exists.* Where an article is to be made or supplied to the order of a vendee, there is an implied warranty of the fitness of the article for the special purpose designated by vendee if known to vendor.

3. SALES, § 387*—*when buyer may keep property and sue for breach of warranty.* Where there is a sale and delivery of personal property with an express or implied warranty, the purchaser may keep and use the property if found to be defective and bring an action for breach of warranty.

4. SALES, § 389*—*when purchaser may recoup damages for defects in goods.* In an action to recover for the purchase price of goods sold under an express or implied warranty the purchaser may recoup damages sustained by reason of defects in the goods.

5. SALES, § 98*—*when buyer may not rescind contract without consent of vendor.* In case of breach of warranty of goods sold under a contract containing no stipulation that the goods may be returned in case of such breach, vendee has no right, in the absence of fraud, to rescind the contract without the consent of vendor.

6. SALES, § 404*—*what is measure of damages for breach of warranty.* The measure of damages in an action for breach of warranty of goods sold is the difference between the value of the article as warranted and its actual value in its defective condition.

7. SALES, § 91*—*when contract not annulled by seller.* In an action by a vendor to recover the purchase price of goods not manufactured by it which were sold under a contract containing no express warranty or clause permitting the return of the goods in case they were found to be defective, a letter from plaintiff to defendant suggesting that the goods be sent to the manufacturer for testing and assuring defendant that such manufacturer would replace the goods if found defective does not amount to a request to return the goods nor amount to an annulment of the contract, especially where plaintiff later informed defendant that the goods had been tested and no defects found.

8. SALES, § 283*—*when no question for jury regarding warranty.* In an action to recover for goods sold and delivered, where the defense is a breach of warranty of the goods sold, there is nothing to submit to the jury in regard to the warranty where there is no evidence that the contract was effectively rescinded, or of defendant's damages as a result of the alleged breach.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Marion H. Cazier, Appellee, v. William L. Mohr, Appellant.**Gen. No. 20,842.**

1. **SPECIFIC PERFORMANCE, § 93***—*when decree for simultaneous performance proper.* In a bill for the specific performance of a contract for the exchange of shares of stock, where it appears that complainant has performed in part, and offers in his bill fully to perform on performance by defendant, a decree that both complainant and defendant simultaneously perform is not open to reasonable objection.

2. **SPECIFIC PERFORMANCE, § 46***—*when performance of contract for delivery of stock not specifically decreed.* Equity will not decree the specific performance of a contract for the delivery of stock which is easily obtainable in the market and where there appears to be no particular reason why vendee should have the particular stock contracted for, and will leave vendee to his action at law.

3. **SPECIFIC PERFORMANCE, § 46***—*when specific performance of contract for delivery of stock decreed.* Equity will decree specific performance of a contract for the delivery of stock whose value is not easily ascertainable, or is not readily obtainable or the delivery of which is required by vendee for some particular and reasonable cause.

4. **SPECIFIC PERFORMANCE, § 4***—*when no adequate remedy at law exists for breach of contract to deliver stock.* In a bill for specific performance of a contract for the delivery of stock, an objection that complainant has a complete remedy at law has no application where it appears that the stock contracted for is not obtainable in the market, and that no means exist for ascertaining its market or cash value.

5. **SPECIFIC PERFORMANCE, § 77***—*when inability of defendant to perform must be pleaded and proved.* In a bill for specific performance, the inability of defendant to perform is a matter of affirmative defense, which must be both pleaded and proved.

6. **SPECIFIC PERFORMANCE, § 93***—*when decree requiring delivery of stock not objectionable.* In a bill for specific performance of a contract to deliver stock, a decree requiring defendant to deliver certain shares of stock is not objectionable as requiring defendant to deliver stock which he does not own or control where defendant's pleadings nowhere allege that he does not own or control such stock, and where defendant's testimony does not show that he is unable to comply with the decree.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

7. APPEAL AND ERROR, § 1396*—*when findings of chancellor not set aside on review.* In a bill in equity where the evidence is conflicting, the findings of the chancellor will not be set aside on review unless clearly and manifestly against the weight of the evidence.

8. SPECIFIC PERFORMANCE, § 91*—*when evidence sufficient to sustain finding.* In a bill for the specific performance of a contract to deliver stock, where the evidence was conflicting, a finding in favor of complainant held not manifestly against the weight of the evidence.

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

H. CLAY CALHOUN and BUNGE & HARBOUR, for appellant.

MATHER & HUTSON, for appellee; WILLIAM A. SHEEHAN, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The bill in this case was filed by appellee against appellant. It prayed that a contract entered into between them be specifically performed. A decree was entered in accordance with the prayer of the bill, from which this appeal is prosecuted. The parties will be designated complainant and defendant as in the court below.

The bill sets up the contract *in haec verba*. The part of the contract involved in this case provides: That the complainant agrees to deliver to the defendant the entire capital stock (one hundred shares) of the Chicago Form Company, a corporation; that the defendant agrees to deliver to the complainant twenty shares of the capital stock of the Hincer Manufacturing Company of Indiana, and twenty shares of the capital stock of the W. L. Mohr Company; that each of said last mentioned corporations was then in the process

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of increasing its capital stock, and that said forty shares of stock was to be a part of such increase; that the complainant agrees to deliver to the defendant ninety-five shares of the said one hundred shares of stock of the Chicago Form Company upon the payment of a certain sum of money, and the remaining five shares of such stock within ninety days; that defendant agrees to deliver to the complainant said forty shares of stock "as soon as practicable and within ninety days." The bill further alleges that complainant assigned and delivered ninety-five shares of the capital stock of said Form Company to the defendant, and that he delivered the certificate representing the remaining five shares of said stock to the defendant, and was ready at all times to assign the same, requiring only that the defendant turn over said forty shares of stock to him; that more than ninety days have elapsed and the defendant neglects and refuses to deliver said stock to the complainant. The defendant answered the bill admitting the execution of the contract, and averring that the complainant had not yet assigned to the defendant all of the capital stock of the Form Company; that at the time of the making of the contract, there was another agreement entered into between the parties by the terms of which complainant agreed to act as manager of the Form Company for a period of two years; that the complainant proceeded to so act, but before the expiration of said period, abandoned, without cause, said Form Company and refused to act as its manager, and that the complainant's agreeing to so act was a part of the consideration of the contract mentioned and set forth in the bill. After replication filed, defendant, by leave of court, amended his answer, said amendment setting up that complainant had an adequate remedy at law. The complainant afterwards, by leave of court, amended his bill. The amendment averred

that the stock of the Hincer and Mohr companies, which was owned and controlled by the defendant, had no market value and was not obtainable in the market; that both companies were close corporations; that no stock had been sold for cash; that there was no means of ascertaining the actual value of the stock; that the complainant was desirous of obtaining the specific stock; that prior to the expiration of the ninety days mentioned in the contract, complainant offered to assign the certificate of the remaining five shares of stock of the Form Company to the defendant; that the defendant at that time told the complainant that the capital stock of the Hincer and Mohr companies had not been increased, and that it was therefore impossible to deliver to the complainant the forty shares of stock, and requested that the matter be held in abeyance; that after the expiration of said ninety days, the complainant on numerous occasions offered to assign the five shares of stock, but the defendant refused to deliver the forty shares of stock; that the defendant finally refused absolutely to deliver said forty shares of stock to the complainant, giving as a reason for such refusal that the complainant had severed his employment with the Form Company. Complainant further set up in the amendment that he was ready to assign the five shares of stock in the Form Company, provided the defendant would deliver said forty shares to him. The answer traverses the allegations of the amendment and avers that the complainant at no time offered the remaining five shares of stock in the Form Company to the defendant, and that complainant said he would never transfer the same until the defendant transferred said forty shares of stock.

The cause was heard in open court and a decree entered finding the material allegations of the bill as amended true. The decree also specifically finds that the complainant delivered to the defendant ninety-five shares of the capital stock of the Form Company;

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that a certificate representing the remaining five shares was also delivered to the defendant, or left in the files of the Form Company, over which the defendant had control, but the complainant had not indorsed it; that stock in the Hincer and Mohr companies has no market value; that neither of said stock is obtainable in the market, and it cannot be ascertained what the cash value of either of said stock is; that within the period of ninety days mentioned in the contract, complainant offered to assign the remaining five shares of the capital stock of the Form Company; that the defendant was either unable or unwilling at that time to transfer to the complainant the stock in the Hincer and Mohr companies; that after the expiration of the said ninety days, the defendant refused to transfer such stock. It was decreed that the defendant delivered to the complainant the forty shares of stock; that, upon such delivery, complainant assign the certificate representing the remaining five shares of the capital stock of the Form Company. From the decree the defendant prosecutes this appeal.

The defendant's chief contention, and the burden of his argument, seems to be, as stated by him, that "one who seeks the aid of chancery to enforce the specific performance of a contract to which he is a party, must, before his becoming entitled to the relief sought, have done all that the contract involved imposes upon him; and for appellee to plead, or to say, as was done in the case at bar, that he would assign the remaining five shares of the capital stock of the Chicago Form Company to appellant, if appellant would assign to him, appellee, the forty shares of stock in the Hincer Manufacturing Company of Indiana and in the W. L. Mohr Company, is not doing equity. * * * Until appellee has assigned the remaining five shares of stock in the Chicago Form Company, how can he complain—how can he obtain the relief he seeks?"

The court decreed that the complainant assign the certificate of the remaining five shares of stock in the Form Company and that the defendant deliver the forty shares of stock in the Hincer and Mohr companies, and the assignment of the stock by the complainant and the delivery by the defendant of the forty shares to the complainant take place at one and the same time. No reasonable ground can be urged against this provision of the decree.

The defendant next contends that a court of equity will not specifically enforce a contract for the sale of personal property where there is a complete remedy at law for damages. While it is true that where stock contracted to be sold is easily obtained in the market and there is no particular reason why the vendee should have the particular stock contracted for, equity will not decree the specific performance of the contract, but will leave the party to his action at law for damages; yet where the value of the stock is not easily ascertainable, or the stock cannot be readily obtained elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted for to be delivered, a court of equity will decree a specific performance of the contract and compel the delivery of the stock. 1 Cook on Corporations (6th Ed.) secs. 337, 338; *Hills v. McMunn*, 232 Ill. 488; *Ames v. Witbeck*, 179 Ill. 458. From the foregoing authorities, it clearly appears that the contention of the defendant is not applicable to the facts in the case at bar.

A further contention of the defendant is that the decree requires him to deliver to the complainant forty shares of stock which the evidence shows he does not own or control. If the defendant is unable to perform the contract which he entered into, such inability is a matter of defense which must be set up by the defendant in his pleadings and proved. *Davenport v.*

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Plano Implement Co., 70 Ill. App. 161; *Greenfield v. Carlton*, 30 Ark. 547; *Harrigan v. Dodge*, 200 Mass. 357; *Borden v. Curtis*, 46 N. J. Eq. 468. Nowhere in the defendant's pleadings does he aver that the reason for his failure to deliver the forty shares of stock to the complainant was the fact that he did not own or control such stock. He, however, did testify concerning his interest in the Hinchey and Mohr companies, but his testimony, which was the only evidence offered on this proposition, was far from satisfactory. Neither by his pleadings nor by the evidence has the defendant shown that he is unable to deliver the stock as the decree provides.

The defendant contends also that on the other matters in issue the evidence does not sustain the decree. There is some conflict in the testimony. The chancellor saw and heard the witnesses in open court, and found in favor of the complainant and against the defendant. Such finding will not be set aside in a court of review unless it is clearly and manifestly against the weight of the evidence. (*Hess v. Killebrew*, 209 Ill. 200; *Phelan v. Hyland*, 197 Ill. 395; *Delaney v. McNeil & Higgins Co.*, 195 Ill. App. 524.) This we are unable to say.

Finding no substantial error in the decree of the Superior Court, it will be affirmed.

Affirmed.

Adam Lossechewich, Appellee, v. Chicago City Railway Company, Appellant.**Gen. No. 20,883. (Not to be reported in full.)**

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by Adam Lossechewich, plaintiff, against the Chicago City Railway Company, defendant, in the Superior Court of Cook county, to recover for personal injuries. From a judgment for plaintiff for \$2,500, defendant appeals.

It appeared that the plaintiff was employed by the defendant as a laborer in cleaning and sweeping cars at the defendant's barns between 69th and 70th streets in the City of Chicago for a long time prior to the time of his injury. He also swept around the barn and offices, and, when ordered, would take a car out on some part of the line where a car had been disabled, turning it over to the regular men. In this work he acted as motorman. The barn extended from 69th to 70th streets, and from Ashland boulevard, and was about one block in width. It was divided into seven bays by partitions extending north and south from 69th to 70th streets. In each bay there were three tracks extending its entire length, which were connected with the tracks in the streets. There were doors in the partitions connecting the different bays. About halfway between 69th and 70th streets there was a long pit about four feet in depth under each track. These pits were to enable the repair man to inspect and repair the cars. As the cars came in they were cleaned and inspected, put in condition and moved to the north end of the barn near 69th street, from which

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place they would be taken out when needed. The barn was in constant use. There were day and night shifts. Twenty-eight men were in the night shift, including the plaintiff. The evidence tended to show that about eight o'clock on the night of April 26, 1911, the car in question was inspected and put in repair by an employee named Little. After the car had been put in condition, Little ordered his helper, Gedraitis, to move the car to the north end of the barn at 69th street, which he did. The car was left just outside of the barn, where it remained for about two and one-half hours, when the night foreman told the plaintiff to take a car out "right away" to 59th street, where some trouble had occurred, and, as was the custom, told plaintiff to take a helper. These helpers were known as trolley boys, and part of their duty was to stand on the back platform during the trip. Plaintiff called a helper and both started towards the car, plaintiff reaching it first. The helper went to take a sign off the car, and plaintiff stepped in behind the car and adjusted the trolley. As soon as the trolley came in contact with the wire, the car backed up and plaintiff was caught between the car and another one standing on the same track. One of his legs was crushed above the knee. As he fell, he pulled the trolley pole from the wire and the car stopped. The mechanism of the car was in such position that the car would back up when the trolley was placed on the wire. There was no direct evidence as to how the mechanism came to be in this position. It was the custom, when cars were standing on the tracks, to leave the car "dead." There were two kinds of cars, known as small and big cars. The car in question was a small car, and the spring on the trolley pole was stiffer than on the larger cars, so that it was difficult to place the trolley pole against the wire without standing behind the car. The evidence also tended to show that it was the custom for either the helper or the motorman to

adjust the trolley pole when a car was to be taken out, and to stand behind the cars, especially the small ones, in so doing. There was no evidence that any one was near the car in question from the time it was placed at the entrance of the barn until the time of the accident, about eleven o'clock, except that given by the witness Daukintis who testified that fifteen minutes before the accident he saw the night foreman come out of the back end of the car in question. The foreman denied this, and testified that he had not been near the car for an hour or two.

The declaration was filed October 27, 1911, and consisted of but one count. It averred, in substance, that the defendant was operating street cars and a barn in connection therewith; that a foreman was in charge of the work in the barn and of the employees, including the plaintiff, which foreman was not plaintiff's fellow-servant, but was a direct representative of the defendant; that the defendant caused the trolley pole on one of its cars to be removed from the trolley wire, and permitted and allowed the mechanism of the car to be and remain in such condition and position that if the trolley were placed in contact with the wire the car would move backwards and against another car standing on the same track; that the defendant knew this, or by the exercise of ordinary care would have known it; that the plaintiff did not know it, and by the exercise of ordinary care would not have known it; that, although the defendant knew of these facts, the foreman "ordered, directed, commanded, allowed and permitted the plaintiff to go between" the cars to place the trolley pole in contact with the wire, and negligently and carelessly failed to warn or advise the plaintiff of the condition in which the car was standing and the plaintiff, while in the exercise of ordinary care for his own safety, in the performance of such order, direction or command, was injured etc. The defendant pleaded the general issue. During

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the trial plaintiff, by leave of court, filed an additional count. It averred, in substance, that the defendant operated certain street cars and barn in connection therewith; that it negligently and carelessly caused the trolley pole of one of its cars to be removed from the wire, and permitted and allowed the mechanism of the car to be and remain in such condition and position that in the event that the trolley pole should be placed in contact with the wire, the car would move backwards and against another car standing on the same track so that the first mentioned car was not reasonably safe, but dangerous and unsafe; that the defendant knew, or by the exercise of ordinary care would have known, of the condition in which the car was standing; that the plaintiff did not know and by the exercise of ordinary care would not have known of such condition; that the plaintiff in the discharge of his duties went between the cars to place the trolley pole in contact with the wire, and, as he did this, the car, by reason of the carelessness and negligence of the defendant, moved backwards and injured the plaintiff. To this count the defendant filed pleas of the general issue and statute of limitations. A demurrer was sustained to the latter plea. Defendant elected to stand by said plea.

The action was twice tried, the jury disagreeing at the first trial. At a second trial the jury found for plaintiff.

The court gave the following instruction for plaintiff, over objection of defendant:

"The court instructs the jury that where a master confers authority upon one of its employees to take charge and control of a certain class of workmen in carrying on some particular branch of its business, such employee in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master and is not a mere fellow-servant and if he is guilty of a negligent and unskilled exercise

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of his power and authority in directing and controlling the work under his charge, it is in law the same as though the master itself was guilty of such conduct."

FRANKLIN B. HUSSEY and CHARLES LEROY BROWN,
for appellant; JOHN R. GUILLIAMS, of counsel.

ELMER, COHEN & BELASCO, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. LIMITATION OF ACTIONS, § 76*—*when statute may be pleaded to amended declaration.* Where an amendment to a declaration, filed after the period of limitation has run, sets up a new cause of action, differing from that stated in the original declaration, the statute of limitations may be pleaded in bar.

2. LIMITATION OF ACTIONS, § 61*—*what constitutes commencement of new action.* An amendment to a declaration stating a new and different cause of action is to be treated as the commencement of a new action.

3. LIMITATION OF ACTIONS, § 58*—*when amendment to declaration relates back to commencement of action.* Where an amendment to a declaration states no new matter or claim but merely restates in a different form the cause of action set up in the original declaration, such amendment relates back to the commencement of the action.

4. LIMITATION OF ACTIONS, § 49*—*when statute arrested by bringing action.* The running of the statute of limitations to a cause of action is arrested by bringing an action on such cause.

5. PLEADING, § 50*—*how question whether cause of action in declaration and that in amendment are the same determined.* The question whether the cause of action stated in the original declaration and that stated in an amendment or additional count are the same or different causes of action is to be determined as matter of law from an inspection of the pleadings alone.

6. NEGLIGENCE, § 132*—*when no recovery for negligent acts not pleaded.* In an action involving negligence, plaintiff must recover on the case made by his declaration and cannot allege a specific act of negligence and recover on proof of negligence of another character.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. PLEADING, § 56*—*how determined whether different counts constitute same or different cause of action.* One of the tests by which it is to be determined whether different counts constitute the same or different causes of action is whether the same evidence will support both counts.

8. PLEADING, § 45*—*when declaration containing one supported count sufficient.* Where a declaration states in different counts two or more causes of action, it is sufficient if one cause is established by evidence.

9. PLEADING, § 50*—*when additional count does not set up new cause of action.* A demurrer to a plea of the statute of limitations interposed to an additional count, on the ground that it stated a different cause of action than the original declaration, is rightly sustained where the gist of the additional count is the failure of defendant to furnish plaintiff with a car in a reasonably safe condition with which to work, and where the original declaration also covers such cause of action, although alleging in connection therewith specific acts of negligence on the part of defendant's foreman.

10. MASTER AND SERVANT, § 154*—*what is duty of street railroad to provide safe cars.* Street railroads are charged by the law with the positive obligation of furnishing to its employees cars in a reasonably safe condition with which to work.

11. MASTER AND SERVANT, § 689*—*when evidence sufficient to sustain verdict for personal injuries due to unsafe condition of street car.* In an action to recover for personal injuries sustained by a motorman as a result of the alleged unsafe condition of the car defendant's foreman ordered him to operate, where the jury were correctly instructed, a verdict for plaintiff held not clearly and manifestly against the weight of the evidence.

12. MASTER AND SERVANT, § 779*—*when instruction on liability of master for negligence of foreman not inapplicable to facts.* In an action to recover for personal injuries sustained by a motorman as a result of the alleged defective condition of a car which defendant's foreman ordered him to operate, an instruction requested by plaintiff that where a master confers authority upon one of its employees to take charge of a certain class of work, such employee in governing and directing the men under his charge is the direct representative of the master and not a mere fellow-servant, and that if he negligently exercises his authority in directing the work the master is liable, held not erroneous as being inapplicable to the facts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William Kontos, Plaintiff in Error, v. William Clemens et al., Defendants in Error.**Gen. No. 21,197. (Not to be reported in full.)**

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed January 27, 1916.

Statement of the Case.

Action by William Kontos, plaintiff, against William Clemens, Robert McLaughlin, Mathew Kersting, Charles F. Healy and others, defendants, in the Municipal Court of Chicago, to recover on a contract. The action was of the fourth class. The court found in favor of all the defendants except Robert McLaughlin. To reverse a judgment for such defendants, plaintiff prosecutes this writ of error.

BEAUREGARD F. MOSELEY, for plaintiff in error.

WINSTON, PAYNE, STRAWN & SHAW, for defendants in error, KERSTING and HEALY.

CHARLES V. BARRETT, for defendant in error, WILLIAM CLEMENS.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 31*—*when judgment affirmed on appeal.* On writ of error to reverse a judgment of the Municipal Court of Chicago in a fourth-class contract action, where a stenographic report containing all the errors assigned has been stricken because not seasonably filed, there is nothing to be passed on by the Appellate Court, and the judgment will be affirmed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Joseph J. McCarthy, Appellee, v. City of Chicago, Appellant.**Gen. No. 21,672.**

1. **APPEAL AND ERROR, § 16***—*when right of appeal exists.* The right of appeal is a statutory creation and did not exist at common law.

2. **APPEAL AND ERROR, § 626***—*when appeal from interlocutory order or decree must be taken.* The right to appeal from an interlocutory order or decree is based entirely on Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), providing that the appeal must be taken within thirty days from the entry of the decree or judgment, and be perfected in the Appellate Court within sixty days from such entry.

3. **APPEAL AND ERROR, § 25***—*when Appellate Court exclusive jurisdiction of appeals.* The Appellate Court has exclusive jurisdiction of appeals under Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), from interlocutory orders and decrees.

4. **APPEAL AND ERROR, § 669***—*when bond must be filed as basis for appeal.* The only manner in which an appeal can be taken from an interlocutory order or decree under Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), is by filing a proper bond approved by the clerk of the court where the proceeding is heard.

5. **APPEAL AND ERROR, § 637***—*when no prayer for an appeal necessary.* In order to appeal from an interlocutory order or decree under Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), no prayer for an appeal is necessary.

6. **APPEAL AND ERROR, § 642***—*when no conditions may be fixed for allowance of appeal.* On an appeal from an interlocutory order or decree under Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), no conditions can be fixed on which the appeal is to be allowed.

7. **MUNICIPAL CORPORATIONS, § 1237***—*when may appeal without giving bond.* Section 98 of the Practice Act (J. & A. ¶ 8635), providing that municipal corporations may in all cases appeal or sue out a writ of error without giving bond, includes appeals from interlocutory orders or decrees.

8. **MUNICIPAL CORPORATIONS, § 1237***—*when must comply strictly with statute granting right to appeal.* The fact that under section 98 of the Practice Act (J. & A. ¶ 8635), municipal corporations are exempted from giving a bond in order to appeal from an interlocutory order or decree under section 123 of the same Act (J. & A. ¶ 8661), does not exempt such municipal corporations from strict

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

conformity in other respects with the statute granting the right to appeal.

9. **APPEAL AND ERROR, § 669***—*when bond must be filed in Appellate Court on appeal from interlocutory order.* The meaning of Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), providing that an appeal from an interlocutory order or decree must be taken within thirty days, is that the bond approved by the clerk of the lower court must be filed in the Appellate Court within thirty days from the entry of the order or decree appealed from.

10. **APPEAL AND ERROR, § 646***—*how appeal from interlocutory order or decree perfected.* An appeal from an interlocutory order or decree under Hurd's Rev. St., sec. 123 (J. & A. ¶ 8661), requiring that the appeal be perfected in the Appellate Court within sixty days from the entry of the order or judgment appealed from, is perfected only by the filing in the Appellate Court within sixty days from the entry of the order or decree appealed from a transcript of the record from which the correctness of the order complained of can be determined.

11. **APPEAL AND ERROR, § 270***—*when appeal from interlocutory order may be taken.* Section 100 of the Practice Act (J. & A. ¶ 8637), relating to appeals from final judgments, orders and decrees, has no application to appeals from interlocutory orders or decrees under section 123 of the same Act (J. & A. ¶ 8661).

12. **APPEAL AND ERROR, § 270***—*what is purpose of statute allowing appeal from interlocutory order.* Section 123 of the Practice Act (J. & A. ¶ 8661), providing for appeals from interlocutory orders and decrees, was intended to secure a quick and summary review of such orders or decrees.

13. **APPEAL AND ERROR, § 624***—*when motion to file supplementary record too late.* On an appeal from an interlocutory order or decree under section 123 of the Practice Act (J. & A. ¶ 8661), a motion made more than sixty days after the entry of the order or decree appealed from to file a supplementary record will be denied.

14. **APPEAL AND ERROR, § 1120***—*when appeal dismissed for insufficiency of record.* An appeal to the Appellate Court will be dismissed if the record on file is not sufficiently complete to present the errors complained of for the determination of the court.

15. **APPEAL AND ERROR, § 1120***—*when record insufficient for purpose of review.* On appeal from an interlocutory order or decree under section 123 of the Practice Act (J. & A. ¶ 8661), a record containing only a copy of the decree appealed from without assignment of errors presents no question for the determination of the Appellate Court, and a motion to dismiss such appeal must be allowed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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16. COSTS, § 67*—*when statutory damages not allowed upon dismissal of appeal.* On an appeal from an interlocutory decree under section 123 of the Practice Act (J. & A. ¶ 8661), held that statutory damages, on dismissing the appeal because of insufficiency of the record, should not be allowed.

17. APPEAL AND ERROR, § 624*—*when motion suggesting diminution of record and asking leave to file supplemental record improper.* On appeal from an interlocutory decree under section 123 of the Practice Act (J. & A. ¶ 8661), where a short record is on file in the Appellate Court within the time fixed by the statute for perfecting the appeal, appellant has no right to make a motion suggesting the diminution of the record and asking leave to file a supplemental record.

18. APPEAL AND ERROR, § 1143*—*when motion for leave to file supplemental record must be made on appeal from final judgment.* In cases of appeals from final judgments, orders or decrees, the record must be filed in the Appellate Court not later than the second day of the term succeeding the rendition of the judgment, order or decree appealed from, and if a short record is then on file in the Appellate Court, a motion suggesting the diminution of the record and asking leave to file a supplemental record must be made on or before the second day of such term.

19. APPEAL AND ERROR, § 864*—*when reviewing court no jurisdiction to hear appeal.* Failure of appellant to comply with the statute in regard to the filing of the record on appeal divests the reviewing court of jurisdiction to hear the appeal, notwithstanding any acts or stipulations of the parties, or orders of court.

20. APPEAL AND ERROR, § 1143*—*when motion for leave to file supplemental record allowed in vacation.* A motion suggesting the filing in the Appellate Court of a short record on appeal and asking leave to file a supplemental record may be allowed in vacation.

21. APPEAL AND ERROR, § 1138*—*when dismissal of appeal does not affect merits of proceeding.* The dismissal of an appeal from an interlocutory order or decree does not affect the merits of the proceeding in which the order or decree appealed from was entered.

Interlocutory appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in the Branch Appellate Court. Appeal dismissed. Opinion filed January 29, 1916.

Statement by the Court. This is an appeal from an interlocutory order of injunction entered June 5,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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1915, in the Superior Court of Cook county. The order in question enjoined the City of Chicago, hereinafter referred to as the appellant, from interfering with the exhibition of a moving picture known as "The Birth of a Nation."

RICHARD S. FOLSOM, for appellant; GEORGE L. REKER and LOUIS B. ANDERSON, of counsel.

CHARLES J. TRAINOR, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

On July 3, 1915, there was filed in the office of the clerk of the Appellate Court for the first district what is designated as a short record, consisting of a copy of the injunction order appealed from.

On September 14, 1915, there was filed in the office of the clerk of the Appellate Court, without any order issuing from this court, what purports to be a complete record of the proceedings leading up to and including the granting of the injunction, save the transcript of the interlocutory order of injunction which was contained in the short record filed July 3, 1915, as above stated.

On October 20th a motion was made in this court by appellant for "an order *nunc pro tunc* as of September 14, 1915, suggesting the diminution of the record, and granting leave to file the addition thereto, instantan as of September 14, 1915." In support of said motion there were filed two affidavits for the appellant, and a stipulation entered into by both parties. In said affidavits it was stated that the reason he did not present his motion earlier was that he relied on a stipulation under date of September 8th, by which stipulation appellee agreed that the complete record might be filed instantan, and as additional reasons: (1) The fact that the judge before whom the cause was heard,

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was unable to attend court for several weeks; and (2) that the solicitors for appellee required considerable time in which to examine the certificate of evidence; and (3) that he endeavored to file an additional record by July 15th, but was informed that the Appellate Court was about to adjourn for the summer vacation, wherefore the cause could not be heard until the October term of said court.

In opposition to this motion, appellee filed counter suggestions on October 21, 1915, which counter suggestions also served as suggestions in support of a motion in behalf of appellee, to dismiss the appeal for the reason "that said appeal was not perfected within the time provided by statute, and the court, at the present time, has no jurisdiction to hear or determine the same."

In support of this contention, appellee urges that an appeal from an interlocutory order being purely a statutory right, the provisions of the statute under which said appeal was taken, must be strictly complied with, hence conformity to the statute is necessary, and the failure to do so deprives the court of jurisdiction.

Appellee further suggests that the reasons set forth in the affidavits submitted by appellant cannot change the duty of the appellant to perfect its appeal in conformity with the statute.

Appellant, in opposition to the appellee's motion to dismiss the appeal, filed counter suggestions in the form of an additional affidavit, wherein were set forth the same facts as in the affidavit supporting appellant's motion made on October 20th to suggest the diminution of the record and for leave to file the addition thereto instanter, as of September 14th.

In said affidavit it was also set forth that the certificate of evidence was not filed until the 19th day of July, and that appellant was unable to secure the record from the clerk of the Superior Court until July

21st, and that on that day he went to the Appellate Court and attempted to make a motion suggesting the diminution of the record and for leave for additional time to file a supplementary record, but was informed that the court was not in session and no judge present before whom such motion could be made; and the further fact that on September 28th, 1915, a stipulation was entered into whereby appellee was given additional time in which to file his briefs, and that he did file same on October 5th thereafter; that this latter fact was relied on by appellant to explain why counsel for appellant did not make that motion on the opening day of the October term of the Appellate Court instead of on the 20th day of October, 1915.

Upon this state of the record we must determine the motions of the respective parties.

The right of appeal is a statutory creation and did not exist under the common law. Until 1887 no appeal would lie from an interlocutory order, but only from a final judgment, order or decree. On June 14th of that year the General Assembly passed an act permitting an appeal from an interlocutory order of court concerning injunctions and receivers, the provisions of which were identical with those now in force. This provision, now known as section 123, chapter 110, page 1789, Hurd's Rev. St. of Illinois for 1911 (J. & A. ¶ 8661), is as follows:

“Whenever an interlocutory order or decree is entered in any suit pending in any court in this State granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court of the district wherein is situated the court granting such interlocutory order or decree: *Provided*, that such appeal is taken within thirty days from the entry of such interlocutory order or decree, and is perfected in said

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Appellate Court within sixty days from the entry of such order or decree. The force and effect of such interlocutory order or decree and the proceedings in the court below shall not be stayed during the pendency of such appeal, and the party taking such appeal shall give bond, to be approved by the clerk of the court below, to secure costs in the Appellate Court. Upon filing of the record in the Appellate Court the same shall there be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other causes in said court. Upon such appeal the Appellate Court may affirm, modify or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require. If such appeal is dismissed, the Appellate Court may allow to the attorney for appellee a reasonable solicitor's fee, not to exceed one hundred dollars, to be taxed as part of the costs of the appeal. No appeal shall lie or writ of error be prosecuted from the order entered by said Appellate Court on any such appeal."

Under the numerous decisions of this court, appellant's right of appeal is based entirely upon this section, which clearly provides that in order to appeal from such interlocutory order or decree, the appeal must be taken within thirty days from the entry of such interlocutory order or decree *and perfected in the Appellate Court within sixty days from the entry of such order or decree*. It has been uniformly held that under this provision the appellant must file a bond in the court entering the order or decree, said bond to be approved by the clerk of said court. The decisions of the Appellate Court—which, under the statute, has exclusive jurisdiction of appeals from interlocutory orders and decrees—are to the effect that section 123 means that the only manner in which an appeal can be taken is by filing a bond approved by the clerk of the court below wherein the proceeding was heard. And they have expressly held that where the bond was approved by the court, instead of by the clerk of said

court, the filing of such a bond was not in conformity with the statute, and the Appellate Court was divested of jurisdiction.

One of the earliest cases taking this view was *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252. In that case a motion was made similar to that in the case at bar, and the court said (p. 255):

“The taking of an appeal under this act consists of a single act—filing a bond approved by the clerk; as the taking an appeal from the judgment of a justice is done by filing a bond with the justice, approved by him, or with the clerk of the court, approved by him.

“No prayer for an appeal is to be addressed to anybody, and nobody can fix any conditions for the appeal.”

In the case of *Harding v. Harding Incandescent Co.*, 98 Ill. App. 141, the appellant prayed an appeal and the Circuit Court ordered that the appeal be allowed “upon his giving and filing a good and sufficient bond according to law in the sum of \$200, together with a certificate of evidence herein, within sixty days from the entry of this order.” The bond was filed and approved by the court, but not by the clerk of the court. Appellee moved to dismiss the appeal on the ground that the appeal was not perfected in accordance with the provisions of the statute providing for appeals from interlocutory orders, and the court said (p. 142):

“The statute provides that an appeal may be taken from an interlocutory order by the giving of a bond by the party taking the appeal, which bond is to be approved by the clerk of the court wherein the order appealed from is entered. In no other manner than by conforming to this statute could an appeal be prosecuted from this order. The statute requires no approval of the appeal bond by the court, but it does require an approval by the clerk of the court. Here the court approved the bond and the clerk of the court did not, and hence the appeal was not perfected.

“The right of appeal is a matter of statutory creation, not a common law right. Hence conformity to

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the statute is essential and a lack of it is jurisdictional. (citing *Fairbank v. Streeter*, 142 Ill. 226; *Greve v. Goodson*, Id., 355; *Tedrick v. Wells*, 152 Ill. 214; *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252; *Hartzell v. Warren*, 77 Ill. App. 274.

"In the two cases last cited precisely the same question was presented as is here, and this court held that it was without jurisdiction and dismissed the appeals."

In the case at bar, however, no question arises as to the filing of an appeal bond, because under section 98 of our Practice Act (J. & A. ¶ 8635) it is provided that municipal corporations may, in all cases, take an appeal or sue out a writ of error without giving bond; and in *City of Chicago v. O'Hare*, 124 Ill. App. 290, it was held that this provision includes appeals from interlocutory orders or decrees.

However, the mere fact that municipalities are exempt from filing a bond does not alter or detract from the rule of law laid down in the foregoing decisions that the benefit of an appeal can be had only by strict conformity to the provisions of the statute by which the right is created.

The statute also provides that, in addition to the appeal being taken within thirty days, it must be perfected in the Appellate Court within sixty days from the entry of the interlocutory order or decree appealed from. This brings us to the question as to what is meant by the language "and is perfected in said Appellate Court within sixty days from the entry of such order or decree."

Appellant contends that the language just quoted has reference only to the filing of the bond, that if said bond is filed within sixty days, it perfects the appeal.

Appellant argues further, that once being perfected (by the filing of a bond) then, under the provisions of section 100 (J & A. ¶ 8637), it had until the second day of the succeeding term of the Appellate Court in

which to file its record; and on oral argument counsel cited cases wherein appeals were prayed from final judgments or decrees and wherein it was held that the appeal was perfected when the bond was filed:

That such is not the meaning of section 123 is evident from the decisions which we have heretofore cited, wherein it was expressly held that when the statute provided that an appeal shall be taken within thirty days, it was meant that the bond, approved by the clerk of the lower court, must be filed within thirty days; hence, we must look for a different interpretation of such language and the only reasonable interpretation is, that there must be on file in the Appellate Court, within sixty days from the entry of the order or decree appealed from, a transcript of the record of the proceeding, from which this court can determine the correctness of the ruling of the court in issuing the interlocutory order complained of.

In appeals from final orders, judgments or decrees, the statute provides that an appeal may be prayed and allowed during the term of the court in which said order, judgment or decree was entered, and the party praying such appeal shall, within such time (not less than twenty days after the entering of said order, judgment or decree) as shall be limited by the court, give and file in the office of the clerk of the court in which the appeal is prayed, a bond in a reasonable amount, to be fixed by the court, and to be approved by the court or by the clerk of the court, under the express order of the court, to secure the adverse party with sufficient security.

Section 100 of our Practice Act (J. & A. ¶ 8637) provides as follows:

“Authenticated copies of records of judgments, orders and decrees appealed from any court to the Appellate Court shall be filed in the office of the clerk of the Appellate Court on or before the second day of the succeeding term of said court: *Provided,*

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twenty (20) days shall have intervened between the last day of the term at which the judgment, order or decree appealed from shall have been entered and the sitting of the court to which the appeal shall be taken; but if ten (10) days and not twenty (20) shall have intervened as aforesaid, then the record shall be filed as aforesaid, on or before the tenth (10th) day of said succeeding term, otherwise the said appeal shall be dismissed. Further time to file such copies of record may be granted by said court in term time or by any justice thereof in vacation upon good cause shown, provided application therefor shall be made before the expiration of the time herein fixed for filing such copies of the record."

It will at once be seen that the taking of appeals from final judgments or decrees is quite different from appeals from interlocutory orders or decrees, for in the former a prayer is necessary and it must be allowed by the court and the bond approved by the court or by the clerk, under express order of the court; which is entirely at variance with the provisions for a bond under section 123.

Section 100 provides that the record shall be filed in the Appellate Court by the second day of the succeeding term, providing a certain number of days has elapsed since the entry of the order appealed from. It further provides, however, that if by the second day of the succeeding term in the Appellate Court there is on file a sufficient record to show what the order was that was appealed from, and that the bond was properly filed as required; in which event application may be made before the second day of the succeeding term for an extension to file such supplemental record as will enable the reviewing court to pass upon the correctness of the order appealed from.

However, there is no provision for any such contingency in section 123. It expressly states in so many words, that the appeal must be taken within thirty days and perfected in the Appellate Court within

sixty days. This entire section was intended to secure a quick and summary review of interlocutory orders or decrees.

Section 123 (J. & A. ¶ 8661) further provides:

“Upon filing of the record in the Appellate Court the same shall there be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other causes in said court.”

This language clearly confirms us in the view that the perfecting of the appeal means the filing of the record in the Appellate Court.

The question, therefore, that presents itself to this court is, whether under the record in this case the appellant has perfected its appeal within sixty days, as provided for under our statute.

The record in this case, which was filed on July 3rd, consisted of only a copy of the decree appealed from. It did not contain a copy of the appeal bond, nor was that necessary, as we have already held that a municipality is not required to furnish a bond in taking an appeal.

On September 14th a supplemental record was filed, without the order of the court, and on October 20th a motion was made for leave to file said supplementary record *nunc pro tunc*, as of September 14th. Whether such record was filed on October 20th or on September 14th, it was long after the sixty days had expired in which appellant should have perfected its appeal.

As heretofore stated, it has been uniformly held that the appeal being purely a statutory creation, the law must be complied with, and a failure to comply therewith deprives this court of jurisdiction. The motion of appellant to file said supplementary record will therefore be denied.

In this view of the case, unless the record on file is sufficiently complete to present for the determination of this court any errors by the chancellor in entering the order complained of, the appeal must be

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dismissed. *Thomas v. John O'Brien Lumber Co.*, 185 Ill. 374.

This record presents merely a copy of the decree. As there are no assignments of error, it presents no question for our determination. The motion of the appellee must therefore be granted and the appeal dismissed.

We see no reason, however, for allowing the statutory damages in this case.

Appellee, in its motion to dismiss the appeal, has proceeded upon the theory that because only a short record was on file which did not present any question for the determination of this court, and because no motion was made within sixty days suggesting a diminution of the record and asking leave to file a supplemental record, there is nothing before this court to determine, because said record does not fully and fairly present to this court the question of the chancellor's right to enter the order complained of.

In making this contention, appellee proceeded upon the theory that as in appeals from final judgments, a short record being on file, a party, by motion made within the time in which a complete record should be on file, may move to suggest the diminution of the record and ask additional time in which to file a supplemental record; that applying the same rule to section 123, *supra*, the appellant might have, within sixty days, made such motion in the case at bar.

In appeals from final judgments, orders or decrees, our Supreme Court has held the law to be as contended for by counsel for appellee, as will be seen from *Thomas v. John O'Brien Lumber Co.*, *supra*, wherein the court said (p. 377):

"The appellant should have filed in proper time a transcript of so much of the record as was then obtainable, had the cause placed upon the docket, and then entered a motion for further time in which to bring in the remaining portion of the record. Not

having filed a complete transcript within the time prescribed by the statute, or a transcript of so much of the record as could be obtained, and asked for further time to complete the same, within the requirement of the rule, the appellee was entitled to have the appeal dismissed."

Even in that view of the case, applying the rule laid down by our Supreme Court with reference to appeals from final orders, judgments or decrees, appellant has failed to perfect its appeal, because at no time within sixty days was a motion made suggesting the diminution of the record or asking leave to file a supplemental record.

Appellant has set forth as reasons why it should be permitted to file a complete record at this time, as requested in its motion of October 20th, and in opposition to the motion to dismiss the appeal, the fact that the judge who entered the order was ill, which accounted for part of the delay in preparing and filing the record; that counsel for appellee required much time in examining the record; and that further fact that the Appellate Court had adjourned at the time appellant finally secured the record from the clerk of the Superior Court on July 21st, and it was informed that there was no judge present before whom a motion could be made suggesting the diminution of the record and asking leave to file a supplemental one; and further, that stipulations were entered into, first, that appellant might file a supplemental record instantaneously on September 8th, and second, granting appellee additional time in which to file his briefs in the Appellate Court.

In cases of appeals from final judgments, orders or decrees, the record must be on file in the Appellate Court not later than the second day of that term of the Appellate Court succeeding the rendition of such judgment, order or decree; or if a short record be on file in the Appellate Court, a motion suggesting the

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diminution of the record, and asking leave to file a supplemental record, must be made on or before the second day of the said succeeding term of the Appellate Court. And it has been uniformly held that the failure to comply with the statute in this respect divests the reviewing court of jurisdiction to hear the appeal, any acts or stipulations by the parties, or orders of court, to the contrary, notwithstanding. *Gibson v. Vail*, 248 Ill. 432; *Fonda v. Jackson*, 203 Ill. 113; *Thomas v. John O'Brien Lumber Co.*, *supra*; *Cook v. Cook*, 104 Ill. 98.

As already stated, such is also the ruling of the Appellate Court in construing the section providing for appeals from interlocutory orders, where a bond is not filed within thirty days.

The suggestion, however, that the Appellate Court was adjourned on July 21st and that no judge was present, is one born, we feel, of the exigencies of the situation in which appellant found itself. The order complained of was entered on June 5th. Under the statute, sixty days was given it in which to perfect an appeal. The formality of having to furnish a bond was dispensed with, so that appellant had the entire sixty days at its disposal in which to secure a proper record to file in the Appellate Court.

The only record filed within the sixty-day period was that of July 3rd, which we have already held was not sufficient to present any issues for the determination of this court.

Appellant, in its affidavit, stated that on July 15th and again on July 21st, counsel endeavored to present a motion in the Appellate Court suggesting the diminution of the record and asking leave for additional time in which to file a complete supplemental record, but were prevented from doing so because no judge was present.

The incorporation of the dates in this affidavit indicates that counsel for appellant recognized that the

record filed on July 3rd was inadequate, incomplete and insufficient; and further that they were of the opinion that a complete record had to be on file in the Appellate Court within sixty days, or motion made within that time suggesting the diminution of the record and asking leave for additional time to file a supplemental one.

This court did not adjourn until July 17th. Therefore there was no reason why, on July 15th, such motion could not have been presented. Although counsel state that they endeavored to make a motion on that day, the record shows that no such motion was ever made. Moreover, a motion of this kind could have been granted by any judge of the Appellate Court in vacation time, and it is a fact, that several judges of this court were at work in the chambers of this court during the entire period of sixty days after the entry of the order complained of. Therefore, if counsel were entitled to make this motion—which we have already held they were not—the failure to do so was not because the Appellate Court had adjourned or because of any inability to find a judge of this court.

The dismissal of this appeal, however, does not in any way affect the merits of the controversy, and the parties are at liberty to proceed to a hearing on the bill after answers are filed, and have determined any and all issues that may be joined.

Appeal dismissed.

Patrick G. Flynn, Plaintiff in Error, v. City of Chicago, Defendant in Error.

Gen. No. 20,641. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed January 29, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Patrick C. Flynn, plaintiff, against the City of Chicago, defendant, in the Circuit Court of Cook county, to recover salary from August 20, 1903, to January 13, 1912, being the period between his wrongful discharge as a police patrolman of defendant city and his reinstatement as such, less what plaintiff had earned in the meantime. From a judgment for plaintiff for \$1,074.43, both parties appeal, and defendant assigns cross-errors.

It appeared that in 1895, the plaintiff passed the civil service examination and qualified as police patrolman of Chicago. He continued as such until August 20th, 1903, when he was removed as the result of charges preferred against him. On June 19, 1906, he filed a petition for a writ of mandamus to compel his reinstatement. On December 22, 1908, the court found that the discharge of plaintiff was unlawful, and granted a writ of mandamus commanding immediate reinstatement. The writ was issued March 9, 1909, and served March 12th. There was no evidence as to what further was done until the 23rd of December, 1911, when an *alias* writ was issued and served on December 27, 1911. Counsel for plaintiff stated that the defendant announced it would sue out a writ of error to review the judgment, which could have been done any time within three years, and that immediately after said period of three years, he obtained an *alias* writ.

Plaintiff was reinstated January 13, 1912, and on February 7, 1912, brought this action.

The action was tried by the court without a jury. It was held that plaintiff was entitled to salary from the time of his discharge to the time his reinstatement was ordered, less the amount earned between the time he was discharged and when he was actually reinstated, and entered judgment for the amount of the difference.

A. D. GASH, for plaintiff in error.

JOHN W. BECKWITH, for defendant in error; JOHN E. FOSTER, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **MANDAMUS, § 170***—*what patrolman seeking reinstatement by mandamus must prove.* A person seeking reinstatement by mandamus as a patrolman must show the legal existence of the office or position, his clear right to the office, and the duty of respondent to perform the act sought to be enforced.

2. **CIVIL SERVICE, § 30***—*when judgment ordering reinstatement establishes title to office.* On a petition for mandamus to compel petitioner's reinstatement as a police patrolman, the rendition of judgment ordering the writ to issue as prayed conclusively establishes petitioner's right to the office.

3. **MANDAMUS, § 139***—*when fact that office has been terminated must be set up by proper plea.* On a petition for mandamus to compel the reinstatement of petitioner in the office claimed, where it appears that during the interval between petitioner's discharge and the filing of the petition his right to the office has been terminated, such fact must be set up by proper plea to the petition.

4. **CIVIL SERVICE, § 31***—*when officer estopped to claim on appeal more salary than claimed on trial.* Where a plaintiff, seeking to recover salary as a police patrolman during the time wherein he was deprived of his position by wrongful discharge in the trial court, asks for the amount of such salary less the amount earned

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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during such period while not acting as a patrolman, he cannot shift his position in the Appellate Court and claim the entire amount of such salary without deduction.

5. TRIAL, § 87*—*when reopening of case to hear further evidence within discretion of court.* Where an action is heard by the court without a jury, the allowance of a motion to reopen and hear further evidence after having announced a finding is within the sound discretion of the court.

6. TRIAL, § 87*—*when court does not abuse its discretion to reopen case to hear further evidence.* In an action to recover salary as a police patrolman, where it appeared that plaintiff was discharged as such patrolman on August 20, 1903, that he brought a petition for mandamus on June 19, 1906, to compel his reinstatement, that on March 9, 1908, the writ was issued and served March 12th, that nothing was done until December 23, 1911, when an *alias* writ was issued and served December 27th, that the delay was explained by showing that defendant notified plaintiff of its intention to bring a writ of error, which was never done, that plaintiff was reinstated January 13, 1912, that plaintiff showed the amount earned between August 20, 1903, and January 13, 1912, but did not show what proportion of this amount was earned between August 20, 1903, and March 9, 1908, and the court found for the amount of salary to which plaintiff was entitled from August 20, 1903, to March 9, 1908, less the amount earned between August 20, 1903, and January 13, 1912, as proved by plaintiff, *held* that the denial of a motion made after finding to reopen the case and hear evidence as to the amount earned between August 20, 1903, and March 9, 1908, was not an abuse of discretion under the evidence.

7. CIVIL SERVICE, § 31*—*when officer cannot recover salary after date of writ of mandamus for reinstatement.* A police patrolman who is wrongfully discharged and obtains a writ of mandamus to compel his immediate reinstatement cannot recover for salary after the date of the writ, although he is not actually reinstated until a much later time, since the power of the State is at plaintiff's command to enforce immediate compliance with the terms of the writ, and if plaintiff delays to invoke such power to enforce his rights such delay is voluntary.

8. TRIAL, § 295*—*when propositions of law submitted too late.* Propositions of law submitted after the trial of the case are properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Home Instructor Publishing Company, Defendant in Error, v. Blumenstock Brothers, Plaintiff in Error.

Gen. No. 21,502. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916.

Statement of the Case.

Action by the Home Instructor Publishing Company, plaintiff, against Blumenstock Brothers, a corporation, defendant, in the Municipal Court of Chicago, to recover for advertising. To reverse a judgment for plaintiff for \$228.95, defendant prosecutes this writ of error..

Plaintiff published a paper called "The Home Instructor," and contracted with defendant to advertise the product of the American Cereal Coffee Company. The order called for the insertion in the October edition 1914, the price to be 68 cents a line, less commission. The advertisement appeared in the October edition. A provision in the order was as follows:

"This order is placed with the understanding that the cost per sale will not exceed the average cost of other mail order mediums used by this advertiser. That this and other copy not exceeding 387 lines will be repeated in the Dec. or any later issue if necessary without charge in order to produce orders at the average cost."

The advertisement had a coupon or form of order with a "key number" attached, which purchasers detached and forwarded to the coffee company. In this way account was kept of the sales resulting through the advertisement. It appeared that plaintiff was ready and willing to carry out its obligation to con-

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tinue the advertisement, but was ordered by defendant not to run it after the October issue.

FYFFE, RYNER & DALE, for plaintiff in error.

L. H. CRAIG, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 219***—*how contract for advertising construed.* In an action to recover on a contract for advertising, a provision in the contract that "this order is placed with the understanding that the cost per sale will not exceed the average cost of other mail order mediums used by this advertiser. That this and other copy not exceeding 387 lines will be repeated in the Dec. or any later issue if necessary without charge in order to produce orders at the average cost," held to be construed as an undertaking to continue the advertisement without further cost until the results to the advertiser, considering cost, were equal to the results obtained from other papers.

2. **DAMAGES, § 57***—*when advertiser liable for contract price of advertising.* In an action to recover on a contract for advertising, where the contract provided that the advertisement should be continued without additional cost in subsequent issues of plaintiff's publication until the results to the advertiser, considering cost, were equal to the results obtained from advertisements in other papers, but where, after one publication, defendant ordered plaintiff not to insert the advertisement again, defendant is liable for the contract price, although it made but one sale as a result of the advertisement, plaintiff not being accountable for failure to perform in such case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wladysus Szymczak, Defendant in Error, v. Schillinger Brothers Company, Plaintiff in Error.**Gen. No. 21,513.**

1. NEGLIGENCE, § 19*—*what does not constitute attractive nuisance.* A barrel possesses no quality attractive to children, as does a turntable or push car, or boards or logs floating on a pool of water, so as to be held to be an attractive nuisance.

2. NEGLIGENCE, § 19*—*when doctrine of turntable cases inapplicable.* The doctrine of the turntable cases as to attractive nuisances is not to be extended to the case of a barrel containing hot tar used in making asphalt.

3. NEGLIGENCE, § 19*—*when person liable for maintaining attractive nuisance causing injury to children.* It is a necessary element of liability for maintaining an attractive nuisance that the thing causing injury be such as to tempt children, and be so located as to attract them from the street or other public place where they may be expected to be, so that the owner may be held bound to anticipate that the children would come on the premises, but an owner cannot be held liable for maintaining for his own use something which might be dangerous to children who trespassed on the owner's land without being attracted thereto.

4. NEGLIGENCE, § 19*—*when person not guilty of actionable negligence in maintaining attractive nuisance.* In an action to recover for injuries sustained by a six-year-old child as a result of defendant's alleged negligence, where it appeared that plaintiff, while trespassing on land of defendant used in making asphalt, put his hand into a barrel containing hot tar, burning the hand, plaintiff being engaged with other children in making tar balls when injured, held that defendant was not guilty of actionable negligence.

Error to the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of fact. Opinion filed January 31, 1916.

MCCASKILL & MCCASKILL, for plaintiff in error.

STAHL & LEWALD, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff, a minor, brought suit alleging the maintenance by defendant of an attractive nuisance whereby he was injured. He had judgment for eight hundred and fifty dollars.

Defendant was engaged in the business of laying concrete and asphalt floors and erecting concrete buildings, and was in possession of a lot on North Seeley avenue, in Chicago, where it melted the tar used in making asphalt. After the tar was melted in a vat it was poured into barrels and allowed to cool. Plaintiff, six years old, living near by, was playing on the lot with other children; they were making tar balls. By standing on a piece of concrete, which he placed for the purpose, he reached into one of these barrels and burned his hand in the hot tar.

We are referred to no case holding a barrel or any receptacle of tar to come within the rule of a danger attractive to children, or, as it is sometimes called, an attractive nuisance. The barrel cannot be said to possess a quality attractive to children, as does a turntable or a "push car," or boards or logs floating on a pool of water, which have been held to be attractive nuisances. In *Newman v. Barber Asphalt Paving Co.*, 190 Ill. App. 636, the court declined to apply this doctrine to a wagon loaded with tar, although it was there urged as it is here that this was "attractive to children and appealed to childish curiosity and instinct to play with and in the making of balls of tar." We are not willing to extend the doctrine of the turntable cases to include a barrel of tar.

Plaintiff lived a very short distance from this lot, on which there was no building except a shed in the rear. With other children he frequently used the lot as a playground. It was while playing there that he noticed the barrel of tar. What is said in *McDermott*

v. Burke, 256 Ill. 401, is applicable to the facts before us. The court there said (p. 406):

"It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be. An owner would not be liable if he maintained something for his own use which might be dangerous but which would only be found by children going upon his premises as trespassers."

We hold that the defendant was not guilty of actionable negligence, and the judgment is reversed with a finding of fact.

Reversed with finding of fact.

Abraham Steiger, Plaintiff in Error, v. Edward F. Keebler, Defendant in Error.

Gen. No. 21,564. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916.

Statement of the Case.

Action by Abraham Steiger, plaintiff, against Edward F. Keebler, defendant, to recover on an alleged promise to repay a broker's commission under certain conditions. To reverse a judgment for defendant upon a trial without a jury, plaintiff prosecutes this writ of error.

It appeared that defendant secured a tenant for plaintiff's store. Plaintiff claimed that before he

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closed the lease he told defendant or his agent that another broker, named Staff, might or did claim a commission for procuring the same tenant, and that defendant said: "If you have to pay the money to the other broker we will pay this back"; whereupon the transaction was closed and Keebler was paid his commission. Subsequently Staff obtained judgment against plaintiff for his commission.

Plaintiff's testimony tended to support the promise made to him, while defendant denied categorically making such agreement. There was evidence tending to show that one Gilbert Keebler, an employee of defendant, made this promise. This was denied by Gilbert Keebler.

WINSTON & LOWY, for plaintiff in error.

SABATH, STAFFORD & SABATH, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 385*—*when evidence insufficient to sustain finding that promise to repay commissions was made.* In an action to recover on an alleged promise by defendant that under certain conditions he would repay a broker's commission paid by plaintiff to defendant for procuring a tenant for plaintiff's store, where the evidence was conflicting, a finding that defendant never made the promise alleged, *held* justified by the evidence.

2. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to sustain finding that employee had no authority to promise to repay commissions.* In an action to recover on an alleged promise by defendant that under certain conditions he would repay a broker's commission paid by plaintiff to defendant for procuring a tenant for plaintiff's store, where there was evidence that the promise alleged was made by an employee of defendant, *held* that such employee had no authority to bind defendant by such promise.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Emil H. Seeman, Defendant in Error, v. John Mills,
Plaintiff in Error.****Gen. No. 21,664.**

1. MORTGAGES, § 223*—*what is relation between mortgagee and grantee assuming indebtedness.* Where a grantee under a deed assumes the debt of a mortgagor, the only relation of principal and surety raised thereby is between themselves, and as to the mortgagee, such grantee becomes an additional promisor on the mortgage note.

2. MORTGAGES, § 227*—*what are remedies of mortgagee where grantee assumes incumbrance.* A mortgagee whose mortgagor has conveyed to a grantee under an arrangement that the grantee assume the payment of the incumbrance may disregard the agreement and proceed against the mortgagor, or may treat the promise made for his benefit as an additional remedy and proceed against the grantee.

3. MORTGAGES, § 227*—*what is effect of assumption of debt by grantee.* The rights of a mortgagee cannot be changed by arrangements between the mortgagor and a grantee of such mortgagor for an assumption of the debt, where such arrangements are without the consent of the mortgagee, but, if such arrangement is accepted by the mortgagee, each party to such agreement is an original promisor for the payment of the incumbrance.

4. MORTGAGES, § 227*—*when mortgagor released by assumption of debt by grantee.* A mortgagor who has conveyed to a grantee under an arrangement that the grantee assume the payment of the incumbrance will not be released from liability on the mortgage note unless the mortgagee consents to accept such mortgagor as surety and look solely to the grantee for payment of the incumbrance.

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916.

OTIS H. WALDO, for plaintiff in error.

WILLIAM G. WISE, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

By confession judgment for \$547.80 on a promissory note was entered against defendant, who subsequently moved that it be vacated, which motion was denied. By affidavits filed in support of the motion, defendant showed that the note signed by him was secured by a deed of trust conveying real estate; that afterwards the defendant sold the real estate to George Wenzelis and wife subject to the mortgage indebtedness, which the grantee assumed and agreed to pay as part of the consideration; that subsequently, the note falling due, an agreement was made between the holder and Wenzelis for an extension of the time of payment of the note, which agreement was without the knowledge and consent of the defendant.

Defendant says that because of these facts the grantee, Wenzelis, became the principal debtor, and the defendant, the mortgagor, became the surety; that the agreement to extend the time of payment operated to release the defendant from the debt. This is not the law. Where a grantee under a deed assumes the debt of the mortgagor, the relation of principal and surety, if there is such a relation, only applies as between themselves. As to the mortgagee, the grantee becomes an additional promisor only. In *Scholten v. Barber*, 217 Ill. 148, 150, the rule is stated thus:

"In this State the rule is, that as between the mortgagor and his grantee who assumes the payment of the encumbrance, the grantee becomes principal debtor and the mortgagor becomes his surety. But the mortgagee is in nowise affected by the agreement to which he is not a party. He may disregard it and bring his action against the original debtor only, or he may accept the promise made for his benefit, and, treating it as an additional remedy, bring his action against the grantee. If the agreement is accepted by the mortgagee, each party to it is an original promisor for the payment of the encumbrance, but the contract rights

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of the mortgagee cannot be changed by any arrangement between the mortgagor and his grantee unless the mortgagee agrees to such change."

In *Elwell v. Hicks*, 180 Ill. App. 554, an extended opinion by Mr. Justice Brown, many cases are considered, with comments, and the court concludes that the original mortgagor will not be released unless it should appear that the mortgagee has consented to accept him as surety merely, and agreed to look solely to the grantee. There is no evidence whatever in the record before us as to such an intention on the part of the holder of the note.

The judgment is right and is affirmed.

Affirmed.

**Automatic Electric Company, Defendant in Error, v.
Albert Campbell, Plaintiff in Error.**

Gen. No. 21,696. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916.

Statement of the Case.

Action by the Automatic Electric Company, plaintiff, against Albert Campbell, defendant, in the Municipal Court of Chicago, to recover on a contract of guaranty. To reverse a judgment for plaintiff for \$1,974.06, defendant prosecutes this writ of error.

Plaintiff's statement of claim alleged that being about to bring suit against the Auto Card Index Company for goods sold and delivered, it was requested by defendant to forbear suit for thirty days, whereupon plaintiff and defendant executed the following written contract:

Automatic Electric Co. v. Campbell, 197 Ill. App. 591.

"Whereas, at the date hereof the Auto Card Index Company, an Illinois Corporation, is indebted to the Automatic Electric Company in the sum of \$1,974.06; and

"Whereas, said Auto Card Index Company is unable at the present time to pay said account; and

"Whereas, Albert Campbell is heavily interested in said Auto Card Index Company as a stockholder; and

"Whereas, said Albert Campbell is willing to guarantee the payment of said account by said Auto Card Index Company;

"Now, therefore, in consideration of forbearance on the part of Automatic Electric Company to urge the collection of said account from said Auto Card Index Company for a period of thirty days from and after the date hereof, Albert Campbell hereby guarantees the payment of said sum of \$1,974.06, on or before June 11, 1913; and further agrees to indemnify and save harmless Automatic Electric Company from any losses or damage it may sustain by reason of its forbearance as aforesaid.

"In consideration of said guarantee by the said Albert Campbell, as aforesaid, the Automatic Electric Company agrees to forbear for thirty days from and after the date hereof, to urge the collection of the said account of \$1,974.06, now due and owing to it from Auto Card Index Company.

"Witness the hands and seals of the parties hereto this 12th day of May, 1913.

Signed AUTOMATIC ELECTRIC COMPANY,

By H. A. HARRIS, V. P.

ALBERT CAMPBELL. (Seal)."

Plaintiff forbore to sue upon the claim as agreed and did not urge collection. Both the Index Company and the defendant failed to pay. On June 12, 1913, plaintiff notified defendant of the default and demanded payment, but defendant failed to pay.

The affidavit of defense alleged that when the contract was signed there was no enforceable debt to forbear and no good and valid consideration for defendant's promise.

At the trial the court allowed plaintiff's motion to strike the affidavit of defense from the files, and denied motions to file an amended affidavit and to amend the affidavit instanter and directed a verdict for plaintiff.

JOHN S. HUMMER, for plaintiff in error.

ALBERT E. WILSON and SEARS, MEAGHER & WHITNEY, for defendant in error; EDWIN HEDRICK, JR. and JOHN W. MCCARTHY, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 231*—*what is right of party to amend pleadings.* A party to an action is not as of right entitled to have leave to amend regardless of the character of the proposed amendment, but should prepare the proposed amendment and submit it to the inspection of the court.

2. PLEADING, § 231*—*when not presumed that amendment of pleading will be proper.* There is no presumption that a proposed amendment of a pleading will be proper, so that it is not error to refuse to allow an amendment not presented where there are no means of determining whether the proposed amendment is proper and sufficient.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense in action on contract of guaranty states no defense.* In an action to recover on a contract of guaranty made in consideration that plaintiff forbear to bring suit on a cause of action named in the guaranty, where the declaration alleged that plaintiff forbore in accordance with the contract, it is not error to strike an affidavit of defense alleging that the time of making the contract there was no good and enforceable debt to be forborne and hence no valid consideration for the guaranty sued on, such affidavit stating no defense to the action.

4. GUARANTY, § 7*—*what is sufficient consideration to support contract of guaranty.* A promise to forbear followed by an actual forbearance is a sufficient consideration to support a contract of guaranty.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Richardson, 197 Ill. App. 594.

5. GUARANTY, § 7*—*when guarantor estopped to deny consideration of guaranty or validity of original undertaking.* In an action on a contract of guaranty the guarantor is estopped to deny the consideration of the guaranty or the validity of the original undertaking.

6. GUARANTY, § 7*—*when consideration of guaranty may not be determined.* In an action on a guaranty founded on a new consideration, independent of the consideration of the original undertaking, the consideration of the original undertaking cannot be inquired into as it forms no part of the consideration of the guaranty, but it is otherwise where the guaranty is made at the same time as or before the original undertaking, since in such case the consideration of the original undertaking is also the consideration of the guaranty.

City of Chicago, Defendant in Error, v. F. S. Richardson, Plaintiff in Error.

Gen. No. 21,756. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916.

Statement of the Case.

Prosecution by the City of Chicago against F. S. Richardson, defendant, in the Municipal Court of Chicago, charging defendant with a violation of section 2019 of the Chicago Code. The case was tried by the court without a jury. To reverse a judgment of conviction with a fine of two hundred dollars, defendant prosecutes this writ of error.

BENJAMIN E. COHEN, for plaintiff in error.

SAMUEL A. ETTELSON and HARRY B. MILLER, for defendant in error; DANIEL WEBSTER, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 39*—*when ordinance must be incorporated in stenographic report for purpose of review.* A defendant in a prosecution charging him with violating an ordinance of the City of Chicago, who desires to preserve for review the question whether a judgment of conviction is supported by the evidence, must cause the ordinance to be incorporated in the stenographic report.

2. DISORDERLY HOUSE, § 2*—*when evidence sufficient to sustain finding as to keeping of disorderly house.* In a prosecution charging defendant with keeping a disorderly house in violation of a city ordinance, evidence held to justify a finding that defendant's place was a disorderly house as charged in the complaint.

3. DISORDERLY HOUSE, § 2*—*when evidence sufficient to sustain finding that defendant knew character of place.* In a prosecution charging defendant with keeping a disorderly house in violation of a city ordinance, the probative force of evidence as to the character of defendant's place will also justify the conclusion that defendant knew its character.

4. DISORDERLY HOUSE, § 2*—*when evidence sufficient to identify premises named in complaint.* In a prosecution charging defendant with keeping a disorderly house in violation of a city ordinance, evidence held sufficient to identify defendant's premises with the premises named in the complaint.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Arthur Freund, Defendant in Error, v. Max Goldenberg, Plaintiff in Error.

Gen. No. 21,768. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916.

Statement of the Case.

Action by Arthur Freund, plaintiff, against Max Goldenberg, defendant, in the Municipal Court of Chicago, to recover on an oral contract of employment to extend from October 16, 1913, to January 15, 1914, at \$45 per week. To reverse a judgment for plaintiff for \$409.50, defendant prosecutes this writ of error.

The evidence tended to show that plaintiff was experienced in the ladies' ready-to-wear clothing business, and in October, 1913, was employed by a ladies' cloak and suit concern, and making \$25 a week, with a prospect of continued employment. At this time defendant and one Bruns purchased a bankrupt stock of merchandise. Neither had ever been in the ladies' clothing business and they needed an experienced man to retail this stock. Defendant asked plaintiff to take charge of the sale of this merchandise, and plaintiff replied that it would not pay him to leave a steady position for a short time. An agreement was made that plaintiff should work for defendant from October 16th until the following January 15th at \$45 a week. Plaintiff entered upon his duties and did the things which are usually done under such circumstances to attract customers, displaying skill and experience. The stock was smoked and burned and of old style, and did not sell at profitable prices. After a week and five days, defendant discharged plaintiff.

Fort Dearborn National Bank v. Hobrecker, 197 Ill. App. 597.

Plaintiff sought to obtain other employment, and from October 28th until March 27th was able to secure a position for only three and a half weeks at \$12 per week.

EBEN F. RUNYAN, for plaintiff in error.

MOSES, ROSENTHAL & KENNEDY, for defendant in error; SIGMUND W. DAVID, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 84*—*when evidence sufficient to sustain finding as to wrongful discharge of servant.* In an action to recover on an oral contract of employment, where there was evidence that the cause of plaintiff's discharge was the failure of defendant to do a profitable business, but where defendant attempted to justify the discharge on the ground that plaintiff made misrepresentations as to his ability, salary and length of service with his former employer, and that he was incompetent and did not perform his work in a good and workmanlike manner, evidence held sufficient to sustain a finding that plaintiff was wrongfully discharged.

Fort Dearborn National Bank of Chicago, Defendant in Error, v. John Hobrecker, Jr., Plaintiff in Error.

Gen. No. 21,122.

MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense in action on written guaranty insufficient.* In an action to recover on a written guaranty of the payment of five promissory notes, it is proper to strike an affidavit of defense admitting default in the payment of one note and liability thereon, but alleging that the other notes sued on were not at the time the action was commenced

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fort Dearborn National Bank v. Hobrecker, 197 Ill. App. 597.

due according to their terms, where it appears that defendant's written guaranty provided that in case any of such notes "shall not be paid promptly at the time when it falls due" plaintiff might "enforce payment of all sums of money due upon said notes or either or any of them," and where a deed of trust given to secure such notes provided that "in case of default in the payment of said * * * notes or any part thereof, * * * at the time and in the manner above specified * * * then in such case the whole of said principal sum * * * shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable," since the language of defendant's agreement in such case provided for a recovery against him on all the notes, whether due or not according to their terms.

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed January 31, 1916.

CUSTER & CAMERON, for plaintiff in error; JOHN M. CAMERON, of counsel.

GUERIN & BARRETT, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

March 27, 1912, defendant Hobrecker executed to the plaintiff bank a collateral instrument of guaranty, wherein he requested and authorized the bank to extend to the Modern Stove Company such credit as it from time to time should make application for, and promised and agreed that in case the bank should at any time purchase of or discount for the said Stove Company any note or notes, etc., or advance to it in any manner any money upon any account, to pay the same, and guaranteed full payment at maturity of any such note or notes, etc., provided that he should not be called upon to pay by virtue thereof more than \$30,000 in the aggregate. April 15, 1914, the Stove Company made and delivered to the bank its four promissory notes of that date, for \$5,000 each and one

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

for \$1,000, and on that date executed to Frank M. Forrey a trust deed to secure said notes, and also another note of said Stove Company, payable to defendant, for \$48,953.46. On the same day defendant executed and delivered to the plaintiff bank an agreement in writing reciting the guarantying by him of certain notes of the Stove Company and the making of the guaranty of March 27, 1912, and further reciting that both he and the Stove Company desired an extension of time to be given the Stove Company to pay its indebtedness to the bank, and reciting the making and delivering to himself of said note for \$48,953.46, and that the bank had extended the time for the payment of said indebtedness, and further reciting the transfer to the bank, as collateral security for said indebtedness, said note for \$48,953.46, and whereby he further agreed as follows:

“*Third.* In case any of the said five notes described in said trust deed, four of them being for five thousand dollars and the other for one thousand dollars, shall not be paid promptly at the time it falls due, or if at any time the said Modern Stove Company shall commit any act of bankruptcy, or shall be sued in any court by any person holding any claim against the said Company, then the said Fort Dearborn National Bank, or any assignee, transferee or endorsee from said Bank may demand payment immediately upon the said demand note, and may sell the same at public or private sale upon giving seven days’ notice by mail, or may immediately foreclose upon the said trust deed or may take any other action which it, he or they may deem necessary in any court to protect its interests, and enforce payment of all sums of money due upon the said notes or either or any of them.”

The sole ground of reversal argued is that the judgment is erroneous except as to the amount due on the first note, because the other notes had not matured at the date judgment was entered. In the brief of plaintiff in error his position is stated as follows:

“The question presented here is this: Is a guaran-

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tor who has made himself liable for payment of notes at maturity bound to pay them at an earlier date, if they are declared due before maturity by the holder under authority of a separate agreement between the maker and the holder of the notes? We contend for the negative of this question, and claim that, except as to the first note, the action against the plaintiff in error was premature."

The trust deed contained a provision that, "in case of default in the payment of said six promissory notes or any part thereof, or the interest thereon or any part thereof, at the time and in the manner above specified for the payment thereof * * * then in such case the whole of said principal sum and interest secured by said six promissory notes shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable." A partial payment of the first note was made subsequently. The defendant admitted his liability for the remainder of that note, past due by its terms at the time of the commencement of the suit, and denied liability for payment of the remaining notes on the ground that he was not liable upon them until they should become due by their terms. The court struck out the affidavit of defense and entered judgment for the plaintiff for the full amount claimed on all five notes without hearing or receiving any evidence except the plaintiff's affidavit of claim. The defendant excepted to the striking out of the affidavit of defense and to the entry of the judgment and brings the case to this court for review.

There is an agreement in the trust deed that "if default be made in the payment of said six promissory notes or any part thereof * * * then in such case the whole of said principal sum and interest secured by said six promissory notes shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable," and the further agreement in the instrument executed by defendant April 15, 1914, that in case any of said five notes shall not be

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paid promptly at the time it falls due, or if the Stove Company shall at any time commit any act of bankruptcy, then the bank may take any other action which it may deem necessary in any court to protect its interests and enforce payment of all sums of money due upon said notes or either or any of them,—both of which contingencies had arisen at the time the suit was begun; and a right of recovery on all the notes was, by the language used and employed by defendant in the instrument signed by him, provided for.

The judgment of the Municipal Court is affirmed.

Affirmed.

Staackman, Horschitz & Company for use of Gustav E. Beerly, Appellees, v. George B. Cary, Appellant.

Gen. No. 21,334.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim in action to recover for breach of contract states cause of action.* In an action to recover for breach of a contract to sell and deliver a quantity of linseed cake, where plaintiff's statement of claim alleged that defendant telegraphed plaintiff in code: "Please make us firm offer P. W. cif Antwerp 500 T. March or first half April;" that plaintiff replied by code telegram: "Make you firm offer 1200 T. March or April cif Antwerp at Frs. 16. Crushers or bankers guaranteeing contract;" that defendant replied by code telegram: "We accept your offer cif Antwerp 1200 T. March or April at Frs. 16," held that the statement of claim stated a cause of action, it appearing that the letters "P. W." as used in the telegram meant "prime western linseed cake," and that the word "firm" similarly used meant "positive."

2. CONTRACTS, § 197*—*when construed in light of usages of trade and of telegrams.* Where defendant telegraphed to plaintiff asking an offer for the sale and delivery of a named quantity of goods, to which plaintiff replied by code telegram making an offer for a larger quantity, which defendant accepted by code telegram, a contract was made to be interpreted in the light of the usages of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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trade in which the parties were engaged, and the previous telegrams between the parties. .

3. CONTRACTS, § 44*—*how offer must be accepted.* An offer to make a contract must be accepted as made, and a modified acceptance is a new offer which cannot constitute a contract until accepted unconditionally.

4. CONTRACTS, § 42*—*what constitutes acceptance of offer by telegraph.* Where an offer to make a contract is sent by telegraph, a telegram in reply saying "we accept," followed by enough of the offer to identify it, is an acceptance of the offer in its entirety.

5. CONTRACTS, § 52*—*when stipulation that informal agreement shall be reduced to writing does not prevent agreement taking effect.* The mere fact that parties intended or stipulated that an informal agreement, either oral or written, should later be reduced to writing will not prevent the informal agreement from taking effect at once, the question whether such agreement does so take effect depending on the intention of the parties.

6. CONTRACTS, § 52*—*when requirement that contract be reduced to writing waived.* In an action to recover for breach of a contract for the sale and delivery of linseed cake, where the contract was made by telegraph, the right of defendant to insist that the contract be reduced to writing, held waived by sending a later telegram requesting an extension of the time for delivery fixed by the contract, such request being a recognition of liability on the contract.

7. TRIAL, § 163*—*when place of delivery under contract question of law.* In case of a breach of a written contract for the sale and delivery of linseed cake, the question of the place of delivery is a question of law to be determined by the court.

8. DAMAGES, § 191*—*when question of what market shall be taken in assessment of damages for court.* In case of breach of a contract for the sale and delivery of linseed cake, the question of what market shall be taken in assessing damages is a question of law for the court.

9. EVIDENCE, § 461*—*when evidence as to legal aspect of document to be disregarded.* Testimony as to the legal aspect of a particular kind of contract is merely testimony as to the law of the case and must be disregarded.

10. SALES, § 71*—*what constitutes a c. i. f. contract.* A "c. i. f." contract is a contract for the sale and delivery of goods at a price to cover the cost of freight and insurance, payment to be made on the receipt of shipping documents by the acceptance of a draft for the amount of the contract price.

11. SALES, § 122*—*what is place of delivery under contract for foreign shipment.* Where the vendor in a c. i. f. contract from Chi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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cago to Antwerp knows that the goods are intended for Antwerp, the place of delivery under the contract is Antwerp, and not the point on the American coast where the goods are to be placed on shipboard.

12. SALES, § 376*—*what is measure of damages for breach of contract of sale.* If, at the time of making a contract of sale, a vendor knows that the goods are to be sold in another market, his liability is measured by adding to the contract price at the agreed time and place the cost of transportation to such market, less the price at such market at the time the goods would have reached their destination had there been no breach.

13. SALES, § 376*—*what is measure of damages for breach of contract for foreign shipment of goods.* In an action to recover for breach of a contract requiring the shipment of goods from New York to Antwerp on April 30th, at the latest, plaintiff is entitled to have damages assessed on the basis of the market price of the goods at Antwerp on May 14th, at which time a vessel sailing from the Atlantic coast April 30th, would usually arrive, and is not limited to nominal damages because there is no evidence of the market price at Antwerp on April 30th, of goods to arrive May 14th, plaintiff having the right to wait until May 14th and to regard the contract as prospectively binding until that time.

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. *Certiorari* denied by Supreme Court (making opinion final).

CHYTRAUS, HEALY & FROST and JOHN PETER BARNES,
for appellant.

GUSTAV E. BEERLY, for appellee; ELLIS S. CHES-
BROUGH, of counsel.

MR. JUSTICE BAKER delivered the opinion of the
court.

Plaintiffs, Staackman, Horschitz & Company, were dealers in linseed cake at Antwerp. Defendant Cary was a broker dealing in such cake at Chicago. He had made twenty or thirty sales of the cake to plaintiffs at a price "to cover cost, insurance and freight, shipping the same c. i. f. Antwerp." March 7, 1913, defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ant telegraphed plaintiffs in code: "Please make us firm offer P. W." (prime western linseed cake) "cif Antwerp 500 T. March or first half April," and telegraphed a similar request March 8th. March 13th plaintiffs at Antwerp telegraphed in code an offer to defendant in Chicago as follows: "Make you firm offer 1200 T. March or April cif Antwerp at Frs. 16. Crushers or bankers guaranteeing contract," to which defendant replied March 14th by telegraph, also in code: "We accept your offer cif Antwerp 1200 T. March or April at Frs. 16." These telegrams, together with a large number of other telegrams, forming the proposed contract, are set forth in the statement of claim. Defendant moved to strike the statement of claim from the files. His motion was denied, and he electing to stand by his motion, an order was entered defaulting him for failure to file an affidavit of merits. While the statement of claim is certainly not a model to be followed, we think it states a cause of action, and the court did not err in refusing to strike it from the files. The defendant having been defaulted, the only question submitted was the amount of plaintiffs' damages. The word "firm" in the plaintiffs' telegram means positive, and is used by both parties in other code telegrams in that sense.

The telegrams made a contract between the parties to be interpreted in the light of the usages of trade and the previous telegrams between the parties. It is true that an offer must be accepted as made, for any modified acceptance is but a new offer and cannot be the basis of a contract until it in terms has been accepted unconditionally. The words "we accept" in defendant's telegram of March 14th, followed by enough of the offer to identify it, was an acceptance of the offer in its entirety. The mere fact that the reduction of an informal agreement, oral or written, by a formal written one was contemplated or stipulated for, does not prevent the former from taking immediate effect.

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The question whether it does or not depends on what the parties intended. *Scott v. Fowler*, 227 Ill. 104, 108; *Stover v. Flack*, 30 N. Y. 64.

If it be conceded that defendant might have insisted on a formal contract, it was competent for him to waive it, and his request by telegram of March 29th, "Owing floods railroads paralyzed; kindly extend contract April May," was a recognition of his liability on a contract made by the telegrams of March 13th and 14th. It was for the court to determine as a question of law the place of delivery, and in case of a breach, what market should be taken in estimating plaintiff's damages. A large part of defendant's testimony and that of some of his witnesses consists of their views of the legal aspect of a c. i. f. contract; but such testimony was but testimony as to the law of the case and must be disregarded. There is a standard definition of that contract in the opinion of Blackburn, Justice, one of the judges called in by the House of Lords in *Ireland v. Livingston*, 5 Eng. & Irish Appeals, 395:

"The terms at a price to cover cost, freight and insurance, payment by acceptance on receiving shipping documents, are very usual and are perfectly understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the ship owner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter party, bill of lading and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-

Staackman, Horschitz & Co. v. Cary, 197 Ill. App. 601.

delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the ship owner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way."

This statement was adopted as a correct statement of the law in *Benjamin on Sales* (7th Ed.) 571.

The contention of appellant that in a c. i. f. contract the place of delivery is the point where the article sold was placed on shipboard, and that the market price at that place is to be taken in estimating damages in case of breach, cannot be sustained. The place of delivery, as has been said, was Antwerp, not the point on the American coast where the cake was to be placed on shipboard, and the defendant knew that the cake was intended for Antwerp. *Stroms Bruks Aktie Bolag v. Hutchinson*, L. R., A. C., 515; *Sutherland on Damages* (3rd Ed.) sec. 653.

"If the vendor knows when he makes his contract that the property is to be sold in another market his liability is measured by adding to the contract price at the agreed time and place of delivery the cost of transporting the property to such market, less the price there at the time it would have reached its destination if there had been no breach." *Van Arsdale v. Rundel*, 82 Ill. 63.

In *Durst v. Burton*, 47 N. Y. 167, an action of fraud in the sale of cheese made at Frankfort, New York, and purchased there to be forwarded to and sold in New York, it was said, page 174:

"The place of delivery was Frankfort, but by the terms of the contract, New York was the market to which it was to be forwarded, and where it was to be sold, and the market price there may be regarded as within the contemplation of the parties."

To the same effect are: *Boyd v. L. H. Quinn Co.*, 17 Misc. (N. Y.) 278; *Wallingford v. Kaiser*, 191 N. Y. 392; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *Louis Cook Mfg. Co. v. Randall & Dickey*, 62 Iowa 244.

O. C. Wilson Advertising Co. v. Orr et al., 197 Ill. App. 607.

The contention that plaintiff was entitled to nominal damages only because the market price at Antwerp on April 30th of cake to arrive May 14th was not shown, is without merit. A vessel sailing from the American Atlantic seaboard April 30th would arrive in Antwerp May 14th, and plaintiff had the right to wait until that time, holding the contract as prospectively binding. *Roehm v. Horst*, 178 U. S. 1; *Long v. Conklin*, 75 Ill. 32.

Conceding the plaintiff was entitled to the benefit of the market price at Antwerp on May 14th, the proof is ample to support the award of damages.

The finding of the Municipal Court is correct and the judgment is affirmed.

Affirmed.

O. C. Wilson Advertising Company, Appellee, v. Louis T. Orr and J. L. Donahue, Appellants.

Gen. No. 21,425.

1. CONTRACTS, § 385*—*when evidence sufficient to sustain finding as to existence of contract for advertising and compliance therewith.* In an action to recover for advertising, evidence examined and held to warrant a finding that defendants made a joint original promise to pay for the insertion of advertising in plaintiff's newspapers, and that plaintiff caused the insertion of the advertisements in accordance with the terms of defendants' promise.

2. EVIDENCE, § 110*—*when act of publishing newspaper may be proved without producing newspaper.* In an action to recover for advertising, it is not error to admit evidence that advertisements were inserted in newspapers without the production of the newspapers containing the advertisements, since the act of publishing a document regarded as distinct from its terms may be proved without producing it.

3. CONTRACTS, § 384*—*when evidence sufficient to sustain verdict*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O. C. Wilson Advertising Co. v. Orr et al., 197 Ill. App. 607.

in action for advertising. In an action to recover for advertising, evidence examined and held sufficient to sustain a verdict for plaintiff.

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916.

CAVENDER & KAISER, for appellants; DONALD L. MORRILL, of counsel.

BECK & MIES, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This appeal brings in review a judgment for nine hundred and ninety dollars entered on the verdict of a jury in an action brought by the appellee against the appellants in the Municipal Court.

From the evidence we think that the jury might properly find that the defendants made to the plaintiff a joint original promise to pay for certain advertising which the plaintiff was to insert in certain newspapers, and that the plaintiff caused the advertisements agreed on to be inserted in newspapers in accordance with the terms of defendants' promise.

The contention of appellants that the court erred in admitting evidence that the advertisements were inserted in newspapers without producing the papers is without merit. The act of publishing a document regarded as distinct from the terms of the document may be proved without production. 2 Wigmore on Evidence, sec. 1248; *City of Des Moines v. Casady*, 21 Iowa 572; *Moore v. Gilliam*, 5 Mun. (Va.) 348; *Lingle v. City of Chicago*, 172 Ill. 170; *McChesney v. People*, 178 Ill. 542.

The evidence is, in our opinion, ample to sustain the verdict, we find in the record no reversible error in procedure, and the judgment of the Municipal Court is affirmed.

Affirmed.

Anna Werner Prise, Appellee, v. Michael Prise, Appellant.**Gen. No. 21,678.**

1. DIVORCE, § 140*—*when application for solicitor's fees too late.* In a bill for divorce, an application for solicitor's fees made after the dismissal of the bill comes too late.

2. DIVORCE, § 85*—*how motion for allowances must be made.* Motions for allowances under section 15 of the Divorce Act (J. & A. ¶ 4230), must be made in the name of the wife and the allowance must be made to her, courts having no power to make such allowance to parties whom the wife has employed.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Orders reversed. Opinion filed January 31, 1916.

RYAN & LEWIS, for appellant.

No appearance for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

March 22, 1914, Anna Werner Prise filed in the Circuit Court a bill for divorce against her husband, the appellant here. Defendant answered the bill and filed a cross-bill August 3, 1914, against the complainant charging her with cruelty, drunkenness and adultery with one Jim Bell, and praying for a divorce. Complainant answered the cross-bill, denying the charges therein made against her. August 7, 1914, the cause was heard by Judge Petit, who entered a decree finding complainant guilty of adultery with Bell and also finding her guilty of habitual drunkenness for more than two years before the filing of the bill. By the decree complainant's bill was dismissed for want of equity and the cross-complainant was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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granted a divorce on his cross-bill. The decree was entered at the July term. August 18th, a day of the August term, Effie Seeds Wellner filed her affidavit, stating *inter alia* that she was awarded fifty dollars solicitor's fees; that the cause was continued to the August term. No order awarding affiant solicitor's fees or continuing the cause appears in the record; but the court, Judge Windes presiding, on said 18th day of August ordered defendant to pay Effie Seeds Wellner fifty dollars, and that on failure of defendant to do so, he should show cause why he should not be found guilty of contempt of court. An attachment was issued for defendant and cross-complainant, and the court found that he had failed to pay Effie Seeds Wellner fifty dollars, and ordered that he be committed to the county jail for thirty days. He prosecutes this appeal to reverse the order directing him to pay Effie Seeds Wellner fifty dollars and the order committing him to the county jail.

The application for solicitor's fees was not made until the August term, and complainant's bill was dismissed for want of equity at the July term. The application for solicitor's fees, not having been made until after the bill had been dismissed, came too late. *McCulloch v. Murphy*, 45 Ill. 256; *Womacks v. Womacks*, 125 Ill. App. 441.

Motions for allowances under the statute concerning divorce and separate maintenance must be made in the wife's name, and the allowance must be made to her and not to the parties whom she has employed, and the court has no power to make an allowance in favor of such parties. *Anderson v. Steger*, 173 Ill. 113; *Lynch v. Lynch*, 99 Ill. App. 459; *Harris v. Harris*, 109 Ill. App. 148; *Miles v. Miles*, 102 Ill. App. 130.

The order allowing fifty dollars solicitor's fees to Effie Seeds Wellner and the order committing appellant to the county jail are reversed.

Orders reversed.

L. Brent Vaughan, Appellant, v. Alice R. Vaughan, Appellee.

Alice R. Vaughan, Appellee, v. L. Brent Vaughan, Appellant.

Gen. No. 21,759. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. Benjamin W. Pope, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill for divorce by L. Brent Vaughan, complainant, against Alice R. Vaughan, defendant, in the Circuit Court of Cook county, and cross-bill by defendant against complainant for separate maintenance. From a decree dismissing the bill for want of equity, and granting the prayer of the cross-bill, with an allowance of seventy-five dollars per month and one hundred and seventy-five dollars for solicitor's fees, complainant appeals.

The parties were married October 11, 1899, and lived together as husband and wife until October, 1910, and thereafter continued to live in the same house until December 4, 1912.

Complainant was forced to leave his house by a foreclosure of the mortgage and rented two rooms with facilities for light housekeeping, and wanted his wife and their twelve-year-old daughter to occupy such rooms, but did not himself live there, but went to the Lexington Hotel and later to the University Club. He did not invite his wife and daughter to come to him at either place.

HARRIS F. WILLIAMS, for appellant.

JAMES J. KELLY, for appellee; JOHN A. BURKE and JOHN T. FITZGERALD, of counsel.

Hazard v. Hazard, 197 Ill. App. 612.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 53*—*when motion to dismiss bill without prejudice properly refused.* It is not error to deny a motion of complainant in a bill for divorce to dismiss his bill without prejudice where a cross-bill has been filed, section 36 of the Chancery Act (J. & A. ¶ 916) providing that "no complainant shall be allowed to dismiss his bill after a cross-bill has been filed without the consent of the defendant."

2. APPEAL AND ERROR, § 725*—*when record need not show findings of fact.* No findings of fact are required to support a decree where the evidence has been preserved by a certificate of evidence.

3. HUSBAND AND WIFE, § 217*—*when decree on cross-bill in divorce action for separate support and maintenance and solicitor's fees proper.* In a bill for divorce by a husband where defendant filed a cross-bill for separate maintenance, and the evidence warranted a finding that defendant was living separate and apart from her husband without her fault, defendant is entitled on her cross-bill to a decree for separate support and maintenance and solicitor's fees.

Florence M. Hazard, Appellee, v. Nathaniel T. Hazard,
Administrator, Appellant.

Gen. No. 21,826.

1. DIVORCE, § 93*—*what is basis for right to alimony.* The right of a wife to alimony depends on the existence of a valid marital relation between the parties.

2. DIVORCE, § 113*—*when right to alimony ceases.* If the marital relation is broken by the death of the husband, the wife's right to alimony ceases.

3. DIVORCE, § 93*—*when suit for alimony not maintainable.* If the marital relation is dissolved by a decree of divorce, the former wife cannot maintain a suit for alimony.

4. DIVORCE, § 135*—*what is basis for order for solicitor's fees.* An order for solicitor's fees to a wife must rest primarily on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

existence of the relation of husband and wife, and unless the parties sustain that relation there is no basis for the order.

5. MARRIAGE, § 29*—*when allowance to maintain suit to annul marriage denied.* In an action brought by the wife to annul a marriage for a cause going to the original legality of the marriage, her allegations will be taken against her as true, and an allowance to her to maintain the action will be denied.

6. DIVORCE, § 135*—*when allowance to maintain proceeding to set aside decree of divorce improper.* An allowance cannot be made to a wife to maintain a proceeding to set aside and vacate a decree of divorce valid on its face.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Order reversed. Opinion filed January 31, 1916.

ALBERT CHANDLER, C. M. CLAY BUNTAIN and CLAYTON W. MOGG, for appellant.

No appearance for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

William Hazard filed in the Circuit Court September 26, 1910, a bill for divorce against his wife, the appellee here, on the ground of desertion. Service was had by publication. Defendant was defaulted and December 3, 1910, a decree was entered dissolving the bonds of matrimony between the complainant and defendant in that suit. December 8, 1914, appellee filed a bill of review in the Circuit Court, alleging that William Hazard died February 3, 1914, and making the appellant here, the administrator of his estate, the defendant. January 14, 1915, the court entered an order directing that defendant as administrator of William Hazard pay complainant fifty dollars per month as alimony *pendente lite* and seventy-five dollars on account of her solicitor's fees.

Counsel for appellant have favored us with an ex-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hazard v. Hazard, 197 Ill. App. 612.

haustive and able brief and argument. Two grounds of reversal are urged: First, that the marriage relation had been dissolved by a decree of divorce granted to the husband, and therefore the former wife could not be awarded alimony *pendente lite*; and second, that the marital relation, if not dissolved by the decree of divorce, was dissolved by the death of the husband, and with his death the wife's right to alimony ceases.

The right to alimony depends on the existence of a valid marital relation between complainant and defendant. *McKenna v. McKenna*, 70 Ill. App. 344; *Lennahan v. O'Keefe*, 107 Ill. 620.

In the case last cited, Mr. Justice Schofield said:

"By the English law, alimony was but an allowance during the joint lives of the husband and wife, or so long as they should live separately. (*Wallingford v. Wallingford*, 6 Harris & Johnson, 438; *Lockridge v. Lockridge*, 3 Dana, 28; *Clark v. Clark*, 6 Watts & S. 85; 1 Blackstone's Com. 441.) And, notwithstanding alimony in this country is, generally, the allowance made to the wife out of the husband's estate after a decree of divorce *a vinculo matrimonii*, and is, by statute, in many respects modified from what it was in case of divorce *a mensa et thoro*, in England, we know of no case in which it has been held to be a debt continuing after the death of the husband against the heir, but directly the contrary was held in *O'Hagan v. Executors of O'Hagan*, 4 Iowa, 509, and, as we think, upon sufficient reason. Bishop, in his work on Marriage and Divorce, (6th ed.) sec. 428, says: 'So, by the unwritten rule, alimony can not be ordered for the term of the wife's life, because it is a maintenance to her, while the husband's duty to maintain her ceases at his death.'"

If the marital relation is broken by the death of the husband, the wife's right to alimony ceases. *Lennahan v. O'Keefe*, *supra*; *Swan v. Harrison*, 2 Cold. (42 Tenn.) 534; *O'Hagan v. O'Hagan's Ex'r*, 4 Clark (Iowa) 509; *Maxwell v. Sawyer*, 90 Wis. 352.

If the marital relation has been dissolved by a de-

cree of divorce, the former wife cannot maintain a suit for alimony. *Chapman v. Parsons*, 66 W. Va. 307. In *Lake v. Lake*, 194 N. Y., it was said, page 185:

“An order for solicitor’s fees must primarily rest upon the existence of the relation of husband and wife. Unless that relation is sustained by the parties, there is no basis for the order. Even in an action brought by the wife to annul a marriage upon a cause which goes to the legality of the marriage originally, the allegations of the wife will be taken against her as true, and an allowance to her to maintain the action will be denied.”

In *Wilson v. Wilson*, 49 Iowa 544, which was a proceeding to set aside and vacate a decree of divorce, it was held that there was no authority to order the payment of money to carry on the suit in the face of a decree of divorce which seemed to be valid.

The order of June 14, 1915, directing defendant as administrator of the estate of William Hazard to pay complainant, Florence M. Hazard, fifty dollars per month alimony *pendente lite* and seventy-five dollars as her solicitor’s fees, is reversed.

Order reversed.

Kuetemeyer v. Illinois Central R. Co., 197 Ill. App. 616.

Harry W. Kuetemeyer, Administrator, Appellee, v. Illinois Central Railroad Company et al., on appeal of Michigan Central Railroad Company, Appellant.

Gen. No. 20,899. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. Hueo PAM, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of facts. Opinion filed January 31, 1916.

Statement of the Case.

Action by Harry W. Kuetemeyer, administrator of the estate of Louis J. Iverson, deceased, plaintiff, against the Illinois Central Railroad Company *et al.*, defendants, in the Superior Court of Cook county, to recover for personal injuries. From a judgment for plaintiff for \$1,000 against defendant Michigan Central Railroad Company, defendant Michigan Central Railroad Company appeals.

Plaintiff at the time of the accident and for a long time previous thereto, was a painter. At and for some time before the accident he worked for one Ettinger, a contract painter for the Illinois Central Railroad Company, at various places along the road of the Illinois Central. He had been acting for about ten days prior to the accident as foreman of painters on the painting job at which he was working when hurt.

Plaintiff had been a sailor and was experienced in splicing ropes and erecting scaffolds. On the day of the accident plaintiff was acting as foreman and was engaged in splicing ropes and in constructing a scaffold to be used in painting the train shed of the Illinois Central Company at a place immediately above the stone wall separating the St. Charles Air Line from the station tracks. Two or three feet east of this stone wall were two parallel tracks running north

and south, known as the St. Charles Air Line, east of which was a switch yard with thirty or forty tracks, The southbound track of the St. Charles Air Line was within three feet of this stone wall. Along these tracks were run engines of the Pennsylvania, North Western, Burlington, Illinois Central, Michigan Central and other railroads.

The place where Iverson was working at the time was about three feet higher than the ground. It was a very busy spot. Both freight and passenger trains were constantly running along the St. Charles Air Line tracks. There was nothing at the time of the accident to obstruct the view of Iverson and the other painters of the movement of trains north and south. Engines came along these tracks both with and without cars. The scaffold upon which Iverson was working had been laid upon the wall under his direction. Iverson was struck by an engine running along the southbound track, causing him to fall to the ground. Iverson swore that he was struck by the steps of the engine, which hung over the track about two feet. Iverson also testified that the engine was marked "M. C. 8172."

It was undisputed that Iverson was and for several years had been well informed of the operation of engines and cars along the track near which he was working.

Defendant Michigan Central Railroad Company offered evidence proving conclusively that the engine of defendant marked with this number was not near Chicago at the time of the accident but, as a matter of fact, was being operated between Windsor, Canada, on the east side of the Detroit River, and Buffalo, in the State of New York, on the Canada Southern Division of defendant appellant's road; and, furthermore, that that engine had never been operated between Michigan City and Chicago.

At the close of plaintiff's evidence both defendants

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moved for an instructed verdict, which the court allowed as to the Illinois Central Railroad Company, but denied as to the Michigan Central Railroad Company. The defendant Michigan Central Railroad Company here again moved, at the close of all the evidence, for an instructed verdict, which was again denied. Plaintiff having died since the entry of judgment, the appeal was defended by the administrator of his estate.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
EDWARD W. EVERETT and CHARLES J. McFADDEN, of
counsel.

T. F. MONAHAN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 438*—*when person struck by engine while painting train shed guilty of contributory negligence.* In an action to recover for personal injuries sustained by a painter by being struck by a railroad engine alleged to be owned or controlled by defendant, where it appeared that at the time of the accident plaintiff was engaged in painting a train shed within a short distance of the track along which engines were constantly passing, evidence held to show that at the time of the accident plaintiff was not as a matter of law, in the exercise of due care for his own safety, it appearing that there was nothing which obstructed plaintiff's view of the track and that if plaintiff had looked he would have seen the approach of the engine, there being no evidence absolving plaintiff from the duty of watching for rolling stock known to be constantly moving along the track.

2. NEGLIGENCE, § 204*—*when verdict should be directed because of contributory negligence.* Although the question of contributory negligence is usually one of fact, yet where all reasonable minds would agree, either from undisputed facts or from plaintiff's evidence with reasonable inferences to be drawn therefrom, that plaintiff's own negligence contributed to his injury, then the question of contributory negligence is a question of law, and the refusal of a peremptory instruction for defendant is reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

3. MASTER AND SERVANT, § 763*—*when verdict properly directed for defendant in action by railroad employee for personal injuries.* In an action to recover for personal injuries sustained by a painter by being struck by an engine alleged to have been owned or controlled by defendant, while engaged in painting a train shed within a short distance of the track on which such engine was running, the question of plaintiff's contributory negligence is one of law requiring a peremptory instruction for defendant, where it appears from plaintiff's testimony that the engine which struck him was in plain sight as it approached, and that his injury was caused by his failure to look for engines and cars approaching from that direction, there being no allegation of wilful negligence or evidence that any one on the engine knew of plaintiff's presence in time to have avoided the accident in the exercise of ordinary care.

4. MASTER AND SERVANT, § 681*—*when evidence sufficient to establish that defendant did not own or operate engine.* In an action against the Michigan Central Railroad Company to recover for personal injuries sustained by being struck by an engine alleged to be owned or controlled and operated by defendant, where defendant pleaded specially denying such ownership or control, and where plaintiff testified that the engine which struck him was marked "M. C. 8172," evidence held sufficient to support the plea, where it appeared conclusively that the engine of defendant marked as testified by plaintiff was not on or near the place of the accident at the time of such accident, but was in fact being operated on another division of defendant's road, and running between Windsor, Canada, and Buffalo, New York.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meinshausen v. American Shipping Co., 197 Ill. App. 620.

Henry Meinshausen, trading as German American Oil Company, Defendant in Error, v. American Shipping Company, Plaintiff in Error.

Gen. No. 21,520. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916. Rehearing denied February 14, 1916.

Statement of the Case.

Action by Henry Meinshausen, trading as the German American Oil Company, plaintiff, against the American Shipping Company, a corporation, defendant, in the Municipal Court of Chicago, to recover back overpayment of insurance premiums. To reverse a judgment for plaintiff for \$544.46, defendant prosecutes this writ or error.

Plaintiff was the resident agent of Botho Farenholtz of Magdeburg, Germany, a manufacturer of oils. Defendant was a custom house broker, having places of business in New York and Chicago. Plaintiff had charge, as such agent, of consignments of oils shipped by Farenholtz to this country. Defendant, at the instance of plaintiff, did the brokerage business connected with the oils shipped by Farenholtz to Atlantic ports. Plaintiff was paid a commission by Farenholtz on the sale of all such oils. Among plaintiff's duties as the agent of Farenholtz was the placing of sea and leakage insurance upon the oil shipped by Farenholtz. Plaintiff arranged with defendant to place insurance.

Defendant was in no way obligated to Farenholtz, its dealings being wholly with plaintiff. To him defendant rendered bills and plaintiff paid them. Farenholtz subsequently reimbursed plaintiff.

SILBER, ISAACS, SILBER & WOLEY, for plaintiff in error; JAMES D. WOLEY, of counsel.

ALEXANDER H. HEYMAN, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to establish that contract was with person individually and not as agent.* In an action to recover back the amount of marine insurance premiums overpaid to defendant, evidence held to show that the contract for insurance was with plaintiff, although it appeared that the goods insured were owned by plaintiff's principal, it also appearing that the contract sued on was with plaintiff, defendant not being obligated to such principal thereunder, and defendant rendering bills to plaintiff which plaintiff paid, it being immaterial that plaintiff was later reimbursed by such principal for such payments.

2. PRINCIPAL AND AGENT, § 220*—*when agent may maintain action to recover overpayments of money.* Where a principal through his agent, pays moneys for insurance premiums which ought not to have been paid, the agent may maintain an action to recover it back.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Johnson v. Hennessey et al., 197 Ill. App. 622.

H. M. Johnson, Receiver, Defendant in Error, v. Thomas Hennessey and Mrs. H. M. Dettmar, Plaintiffs in Error.

Gen. No. 21,690. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916.

Statement of the Case.

Action by H. M. Johnson, receiver, plaintiff, against Thomas Hennessey and Mrs. H. M. Dettmar, defendants, in the Municipal Court of Chicago, to recover for rent due under a written lease. To reverse a judgment entered for plaintiff by confession under power in the lease, defendants prosecute this writ of error.

Defendants moved on the affidavit of defendant Hennessey to open the judgment and to be let in to defend the action. The affidavit sets forth that the defendant Dettmar was in physical possession of the premises leased; that she was "raided" on a charge of maintaining a disorderly house; that plaintiff told Hennessey that tenants in the building complained about the disorderly establishment and compelled her to move; that he, Hennessey, never had any physical possession and signed the lease as guarantor only.

BENJAMIN E. COHEN, for plaintiffs in error.

C. W. MULFINGER, for defendant in error; DEMING & JARRETT, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 82*—*when motion to open judgment by confession properly denied.* A court is not authorized to open a judgment by confession in an action against two defendants to recover rent due under a written lease under which one defendant was lessee and the other guarantor, where the affidavit filed in support of the motion to open shows that at the request of plaintiff defendant guarantor removed defendant lessee from the demised premises for keeping a disorderly house, such facts not being a defense to the action for rent.

2. LANDLORD AND TENANT, § 6*—*when guarantor of lease regarded as lessee.* In an action to recover rent due under a written lease where one defendant executes as lessee and the other as guarantor, the rights of the parties must be admeasured by the lease, and both defendants are, as to plaintiff, lessees thereunder and bound to perform its covenants, including that for payment of rent, although the relation of principal and guarantor may exist as between defendants and lessee may be bound to recompense guarantor for amounts which he may be compelled to pay as such.

3. LANDLORD AND TENANT, § 443*—*when relation not terminated by act of colessee.* Where a lease is executed by one as lessee and by another as guarantor, the relation of landlord and tenant existing by virtue of the lease between lessor and guarantor is not terminated, and such guarantor is not relieved from liability as such by reason of the fact that at the request of lessor guarantor removed lessee from the demised premises for keeping therein a disorderly house, guarantor being liable to lessor for allowing his cotenant to conduct a disorderly house on the demised premises, and under a duty to suppress such conduct by such cotenant.

4. CONTRACTS, § 164*—*when parol evidence not admissible for purpose of construction.* Where a written instrument is not ambiguous, parol evidence to construe its terms is incompetent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Alfred D. Koenig by David Koenig, Defendant in Error, v. Frank Semrau, Plaintiff in Error.

Gen. No. 21,739. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed January 31, 1916.

Statement of the Case.

Action by Alfred D. Koenig, a minor, by David Koenig, his next friend, plaintiff, against Frank Semrau, defendant, in the Municipal Court of Chicago, to recover for personal injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile, alleged to have been negligently operated. To reverse a judgment for plaintiff for \$400, defendant prosecutes this writ of error.

John Semrau, a minor and son of defendant, was driving his father's large touring car, and Alfred D. Koenig was riding his motorcycle.

It appeared that John Semrau, who was driving north, suddenly and without giving any warning turned the car, so that he might drive it southward, when Alfred D. Koenig, who was riding south at a reasonable speed, collided with defendant's car, injuring both himself and his motorcycle. Both sons of defendant who were in the car swore that they looked before John turned, without seeing any vehicle in sight. Koenig was within clear view of the occupants of the car. It was admitted that the street was clear of vehicles, and that there were no obstacles to obstruct the vision of those in the car.

ROYAL W. IRWIN, for plaintiff in error.

PEDEN, KAHN & MURPHY, for defendant in error;
R. C. MERRICK, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when evidence sufficient to establish negligence in operation of automobile.* In an action to recover for personal injuries sustained as a result of a collision between plaintiff's motorcycle and defendant's automobile, evidence held to show that the driver of the automobile was negligent, it appearing that the motorcycle and automobile were proceeding in the same direction, and that the collision was caused by the attempt of the driver of the automobile to turn so as to proceed in the opposite direction, obstructing plaintiff, who was riding at a reasonable rate of speed.

2. AUTOMOBILES AND GARAGES, § 3*—*when evidence that no vehicle was in sight before automobile turned, of no weight.* Evidence of the occupants of an automobile that before starting to turn the car so as to proceed in the opposite direction they looked around without seeing any other vehicle in the vicinity is of no weight, where it is not disputed that at such time a motorcycle was being ridden on the same street in full view from the place where the automobile was when the attempt was made to turn.

3. NEGLIGENCE, § 1*—*what constitutes.* Where there is nothing to obstruct vision it is negligence not to see what is clearly visible.

4. DAMAGES, § 129*—*when verdict not excessive.* In an action to recover for injuries sustained by reason of a collision between plaintiff's motorcycle and defendant's automobile, where damages were claimed both for personal injuries and injuries to the motorcycle, a verdict for plaintiff for \$400 held not excessive, it appearing that plaintiff's right arm was fractured in two places, and that it cost \$99.50 to repair the motorcycle.

5. AUTOMOBILES AND GARAGES, § 3*—*when evidence sufficient to sustain verdict.* In an action to recover for personal injuries sustained as a result of a collision between plaintiff's motorcycle and defendant's automobile as the result of the attempt of the driver of the automobile, suddenly and without warning, to turn and proceed in the opposite direction, such automobile prior to the attempt to turn having proceeded in the same direction as plaintiff, a verdict for plaintiff held supported by a preponderance of the evidence.

6. COSTS, § 73*—*when expense of additional abstract taxable.* Where the abstract filed by appellant is insufficient, it is proper

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to tax as part of the costs the expense of an additional abstract filed by appellee.

Illinois Glass Company, Defendant in Error, v. Ozell Company, Plaintiff in Error.

Gen. No. 21,765.

1. SALES, § 153*—*what constitutes acceptance of goods.* Payment for goods after retaining them after delivery a sufficient length of time to examine them constitutes in law an acceptance, and makes the goods the property of the vendee.

2. SALES, § 108*—*when buyer may not rescind contract.* A vendee who, by the sale of some of the goods, has put it out of his power to restore them to vendor cannot rescind the contract of sale, since a contract can only be rescinded *in toto*.

3. SET-OFF AND RECOUPMENT, § 17*—*when unliquidated damages may not be counterclaimed.* Unliquidated damages cannot be counterclaimed in an action based on a transaction separate and distinct from the transaction which is the basis of the counterclaim, and where neither transaction grew out of nor is related to the other.

4. DAMAGES, § 81*—*what constitute unliquidated damages.* Damages for defects in bottles sold and delivered in pursuance of a contract are unliquidated, and cannot be made liquidated by an arbitrary method of calculation.

Error to the Municipal Court of Chicago; the Hon. SHERRIDAN E. FAY, Judge, presiding. Heard in this court at the December term, 1915. Affirmed. Opinion filed January 31, 1916.

DEMING & JARRETT and RAYBURN & BUCK, for plaintiff in error.

CULVER, ANDREWS, KING & COOK, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

This review is sought by defendant from a judgment against it in favor of plaintiff for \$918.02.

The parties, as shown by the record, had two transactions, in both of which plaintiff was the seller and defendant the purchaser. The commodities sold were bottles. The amount due for the first sale was paid, that for the second is unpaid, and to enforce its payment this suit was commenced. In this suit defendant has counterclaimed for damages alleged to have been sustained by reason of defects in the bottles sold and paid for, a large quantity of which defendant endeavored to return to plaintiff.

There is no controversy concerning the amount due plaintiff for the bottles involved in this suit. The whole controversy hinges on defendant's counterclaim, amounting to \$532.69, which it asks to have deducted from plaintiff's claim. Defendant sent plaintiff the difference between plaintiff's claim and defendant's counterclaim, which plaintiff refused to accept and returned. Plaintiff resists defendant's counterclaim on two grounds:

First. That a contract, if disaffirmed, must be disaffirmed *in toto*; that such contract cannot be affirmed as to part and rescinded as to part. In other words, the party rescinding must restore the *status quo*.

Second. That the damages claimed by defendant are unliquidated and can, in no event, be set off in this action.

With these contentions we are inclined to agree.

Defendant paid for the first purchase of bottles after having had them for more than a sufficient time to examine them, which fact constituted in law an acceptance. By so doing defendant made the bottles its own. Moreover, it used a very substantial part of them and thereby put it out of its power to restore them to plaintiff by the rescission of the contract under which they were purchased. As defendant could

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not rescind the contract *in toto*, it could not rescind it at all. *Waukesha Canning Co. v. Henry Horner & Co.*, 138 Ill. App. 564.

The claim and counterclaim were separate and distinct transactions. Neither in any way grew out of or was related to the other. The damages sought to be set off in the counterclaim are in no wise liquidated; neither are they made so by defendant's suggested arbitrary method of calculating its damages. This case on fact and principle comes within the ruling in *Turnbull Joice Lumber Co. v. Chicago Lumber & Coal Co.*, 152 Ill. App. 347, where the court say, as we say here: "We think the defendant's claim is for unliquidated damages as defined in *Higbie v. Rust*, 211 Ill. 333; *Horn v. Noble*, 95 Ill. App. 99; *Smith v. Billings*, 62 Ill. App. 77."

There being no error in the record, the judgment of the Municipal Court is affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Harry Davis, Plaintiff in Error.

Gen. No. 21,072. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 1, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois against Harry Davis, defendant, in the Municipal Court of Chicago, charging defendant with an attempt to commit larceny. To reverse a judgment of conviction with sentence of confinement for six months in the House of Correction, defendant prosecutes this writ of error.

CLAUDE F. SMITH and OTTO WADEWITZ, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. CRIMINAL LAW, § 505*—*when not presumed that court did not order entry of plea of not guilty.* In a prosecution charging defendant with attempt to commit larceny, where the record shows that defendant refused to be arraigned, but the record appears on its face not to be a complete record, the court will not presume that on defendant's refusal to be arraigned the court did not order the entry of a plea of not guilty or that such plea was not in fact entered.

2. CRIMINAL LAW, § 497*—*when every presumption in favor of judgment upon review.* Where the record on review in a criminal

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shanklin v. Kamin, 197 Ill. App. 630.

case is on its face fragmentary and incomplete, the judgment reviewed will be supported by every reasonable intendment and presumption.

3. CRIMINAL LAW, § 444*—*when bill of exceptions need not contain plea of not guilty.* On review of a judgment of conviction in a criminal case, it is immaterial that the bill of exceptions does not show that a plea of not guilty was entered by or for defendant, since the place where such plea should appear is the common-law record and not the bill of exceptions.

4. CRIMINAL LAW, § 444*—*what is office of bill of exceptions.* The use of a bill of exceptions in a criminal case is not to embrace in it matters of record, but to make a part of the record matters which otherwise would not be such.

Philomina V. Shanklin, Plaintiff in Error, v. William Kamin, Defendant in Error.

Gen. No. 21,129. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and judgment here with finding of facts. Opinion filed February 1, 1916.

Statement of the Case.

Action by Philomina V. Shanklin, plaintiff, against William Kamin, defendant, in the Municipal Court of Chicago, to recover back money deposited as security for the faithful performance of the covenants of a lease. To reverse a judgment for defendant, plaintiff prosecutes this writ of error.

The defendant leased to plaintiff the store and basement of premises known as 1391 Milwaukee avenue, to be occupied as a theater, from July 1, 1910, until April 30, 1913. Plaintiff agreed to pay as rent \$5,100, in monthly instalments of \$150, except the last three months, which sum of \$450 had been paid as security.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The seventh clause provided that: If plaintiff should abandon or vacate the premises, they might be relet by defendant for such rent and upon such terms as he might see fit; and if a sufficient sum should not be realized, after paying the expenses of such reletting and collecting, to satisfy the rent reserved, plaintiff would satisfy and pay all deficiency.

It appeared that plaintiff vacated the premises on the last Sunday in May, 1911 owing defendant \$150, as rent for the month of May, 1911.

After the close of all the evidence and before a finding, the defendant asked and obtained leave to file and did file an amended affidavit of merits, in which he alleged in part that plaintiff had abandoned said premises; that defendant "has considered and treated said abandonment by plaintiff and her failure to pay rent as a *termination of the tenancy and cancellation of the lease*, and has made efforts to re-rent the premises to other parties and did so in his own name as owner;" and that in finding new tenants and negotiating new leases he expended time and effort and paid attorney's fees, etc.

The action was tried by the court without a jury. No further evidence was heard after the filing of defendant's amended affidavit of merits, and the court found the issues for defendant.

ALDEN, LATHAM & YOUNG, for plaintiff in error.

DARROW, BAILEY & SISSMAN, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 330*—*when judgment for landlord in action by tenant to recover deposit improper*. In an action to re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shanklin v. Kamin, 197 Ill. App. 630.

cover back money deposited to secure faithful performance of a lease which plaintiff abandoned before the end of the term, where defendant's amended affidavit of merits alleged such abandonment and that defendant "has considered and treated said abandonment by plaintiff and her failure to pay rent as a termination of the tenancy and cancellation of the lease," a judgment for defendant is erroneous where it appears that the amount deposited was \$450 and the amount owed to defendant by plaintiff at the time of such abandonment was \$150, the proper judgment in such case being for plaintiff for \$300.

2. LANDLORD AND TENANT, § 326*—*when question of cancellation of lease and termination of tenancy one of fact.* The question whether a lease has been canceled and tenancy thereunder terminated is one of fact.

3. LANDLORD AND TENANT, § 274a*—*when rights of parties as to deposit fixed as of date of cancellation of lease.* Where money is deposited to secure the faithful performance of the covenants of a lease, and the lease is canceled and determined prior to the expiration of its term, the rights of the parties as to the amount deposited are fixed as of the date of such cancellation, and lessor can resort to such deposit only to satisfy rent due or loss accrued at such time.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James Monahan, Defendant in Error, v. W. O. Johnson, Receiver, Plaintiff in Error.

Gen. No. 21,179. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. WILLIAM B. SCHOFIELD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed with finding of facts. Opinion filed February 1, 1916.

Statement of the Case.

Action by James Monahan, plaintiff, against W. O. Johnson, receiver of the Chicago & Milwaukee Electric Railroad Company, defendant, to recover for personal injuries sustained in a collision between defendant's train and the dump cart on which plaintiff was riding when injured. To reverse a judgment for plaintiff for \$2,500, defendant prosecutes this writ of error.

The declaration consisted of three counts. The first alleged, in substance, that on July 31, 1911, the defendant was in possession and control of and operating an electric railway running through Glencoe; that on said day the defendant was then propelling an electric car in a southerly direction at or near where the tracks intersected a public street, known as Scott avenue; that plaintiff was driving a team of horses and wagon on that street and across the tracks, and while he was in the exercise of ordinary care for his own safety the defendant so negligently managed the car that it ran into and struck plaintiff and the wagon, and plaintiff was thrown to the ground and was severely injured, etc. The second count set up an ordinance of the village requiring gates to be operated at the crossing and charged that defendant's negligent violation of the ordinance caused plaintiff's injury. The third count set up an ordinance limiting the speed of trains

to twelve miles per hour and charged the negligent violation thereof by defendant, etc. A plea of the general issue was filed, also a plea denying possession or operation by defendant. The evidence tended to show a violation of both ordinances, no gates being maintained or operated at the crossing, and that the speed of the car immediately prior to the collision was greater than twelve miles per hour.

It appears that Scott avenue, on the easterly side of the two parallel tracks of the railroad, runs in a north and south direction; and that the tracks run northwesterly and southeasterly, so that one approaching the tracks on Scott avenue from the north crosses the tracks diagonally. North-bound cars were run on the east track and south-bound cars on the west track. On the westerly side of the tracks there is a turn in Scott avenue towards the west, and the street crosses the tracks of the Chicago & Northwestern Railroad Company substantially at right angles, which last named tracks are about seventy-five feet distant from the electric railroad tracks and run practically parallel therewith. For about three months prior to the accident plaintiff was employed as a teamster. He was about fifty-eight years of age and his hearing and eyesight were good. During the period of his employment he went over this crossing many times and was thoroughly familiar with it, and knew that the railroad company ran both express and local trains and that "express trains ran faster than the local trains." The accident happened about 1 p. m., July 31, 1911. It was a bright, clear day. The wagon was an ordinary dump wagon with no coverings over or around the seat. Plaintiff testified that as he approached the tracks from the north he was driving his team at a walk in the center of the road; that when about ten feet from the east track he stopped and looked both ways; that when he then looked north he could only see about seventy-

five feet up the west track and that he did not see any car or hear any whistle, and then started to cross and "kept looking all the time;" that when the horses were on the west track and the wagon on the east track he first saw the car; that it was then "right up against" him and that it struck the front wheel of the wagon, and that he knew nothing after that until he was helped upstairs to a doctor's office in Winnetka. It further appeared from the evidence that the train was an express train; that when it stopped, the rear end of the rear car was about in the center of the street. It appeared a person in the center of Scott avenue at a point nineteen feet east of said east track could see a car approaching from the north on the west track five hundred feet away, and that as a person moves nearer he can see a car at a greater distance. Several of plaintiff's witnesses testified as to the speed of the train and to not hearing any whistle immediately prior to the collision.

Defendant called as witnesses the motorman of the train which struck plaintiff, three of the passengers in the first car, and a young woman who was standing at some distance waiting for a car. It appeared that plaintiff was plainly seen from the train at a distance of from one hundred and fifty to two hundred feet, at which distance the motorman repeatedly blew the whistle, but, plaintiff paying no attention, started to stop the train. The witness who was waiting for a car testified that she called to plaintiff but plaintiff paid no attention, seeming to be asleep. This witness testified that plaintiff did not stop at any time or look up and down the track.

BULL & JOHNSON, for plaintiff in error.

RICHARD J. FINN, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Monahan v. Johnson, 197 Ill. App. 633.

Abstract of the Decision.

1. INTERURBAN RAILROADS, § 4*—*when person driving team over crossing guilty of contributory negligence.* In an action to recover for injuries sustained by being struck by defendant's electric train while driving a dump cart across a crossing, where plaintiff just before reaching the crossing had an unobstructed view of the track for five hundred feet in the direction from which the train came, the accident occurring at about 1 p. m. on a clear day, there being also evidence that plaintiff was plainly seen from the train at a distance of two hundred feet before reaching the crossing, *held* that plaintiff was guilty of contributory negligence proximately contributing to his injury, although plaintiff testified that before starting to drive across the track he stopped and looked, seeing no train, since if plaintiff looked as he testified he must have seen the train.

2. INTERURBAN RAILROADS, § 4*—*when failure to look and listen at crossing precludes recovery.* It is the duty of one approaching an interurban railroad crossing on a highway to look and listen for approaching trains if a reasonably prudent person so situated would have looked and listened, and, under such conditions, failure to look and listen will preclude recovery where by looking and listening the injury would have been prevented, unless there were circumstances justifying such failure or unless the view was obstructed.

3. INTERURBAN RAILROADS, § 4*—*when evidence that person before crossing track looked and did not see train, of no weight.* A plaintiff in an action for personal injuries is not allowed to testify that he looked before starting to cross an interurban railroad track and saw no train where the view was unobstructed and where, if he had properly exercised his sense of sight, he must have seen the train.

McGOERTY, J., dissenting.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William H. Selle, Defendant in Error, v. Bernhard Rosenstiel, Plaintiff in Error.

Gen. No. 21,199. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 1, 1916. Re-hearing denied February 11, 1916.

Statement of the Case.

Action for malicious prosecution by William H. Selle, plaintiff, against Bernhard Rosenstiel, and Abraham Stiefel, and Ed. Rosenstiel, son of Bernhard Rosenstiel, defendants, in the Municipal Court of Chicago. The jury found Abraham Stiefel not guilty and the two Rosenstiels guilty, and assessed plaintiff's damages at \$1,000. Subsequently, on plaintiff's motion, the writ was dismissed as to Ed. Rosenstiel. Judgment was rendered against Bernhard Rosenstiel for \$1,000, to reverse which he prosecutes this writ of error.

Plaintiff alleged in his second amended statement of claim, in substance, that on July 9, 1913, the defendants in pursuance of a conspiracy went to a store in Chicago where plaintiff was employed and assaulted and maltreated plaintiff; and on July 10, 1913, the defendants, conspiring and maliciously intending to injure plaintiff, caused a warrant to be issued for plaintiff's arrest upon a complaint charging an assault and battery, etc., and caused plaintiff's arrest and imprisonment; that on July 30, 1913, plaintiff upon a trial was found not guilty and duly acquitted; and that the prosecution had wholly ended.

The defendants entered a joint appearance and filed separate affidavits of merits.

The controversy appeared to have arisen over furniture bought by plaintiff of Bernhard Rosenstiel and

Abraham Stiefel, copartners, and later with the consent of said defendants taken by plaintiff's mother, who refused to make payments or deliver the furniture.

July 9, 1913, Bernhard and Ed. Rosenstiel called on plaintiff at the store where plaintiff was employed, and inquired why payments had not been made or the furniture returned. Plaintiff testified that on his attempting to explain, Bernhard Rosenstiel accused plaintiff of stealing the furniture and of being a thief, and further said: "When we get through with you, you won't have any job. We will follow you to the end of the earth. Not only that, we will take you down in the alley and kick your * * * head off."

The testimony was conflicting as to who struck the first blow. Bernhard Rosenstiel testified that he went to a physician's office for treatment, and then went to Fox Lake, Illinois. Ed. Rosenstiel testified that he accompanied his father to the train and they talked of arresting plaintiff. Bernhard Rosenstiel further testified that on July 10th he arrived in Chicago about 8:45 a. m., and consulted his attorney at his office, telling him of the occurrences, and was advised to have plaintiff arrested; and that then he went to court and made affidavit to and filed a complaint at about 10 o'clock. The record of the prosecution which was in evidence disclosed that the complaint was filed July 10, 1913; that it alleged that on July 9, 1913, William H. Selle did aid and assist in a riot and breach of the peace, and did unlawfully and wilfully assault another person; that Selle would escape unless arrested and that he was not a resident of the City of Chicago, was only temporarily in said city and was about to depart from same; that a warrant was issued and that plaintiff was arrested and brought into court July 18th, and that after a full hearing was found not guilty and discharged. Plaintiff testified that he was confined in a cell for about four hours before he was released on bail. It further appeared that after the

arrest and up to the time of the trial of this action, plaintiff's mother had made payments on the furniture.

CHARLES W. STIEFEL and JOHN B. HEINEMANN, for plaintiff in error.

B. C. DARLEY and B. F. JOHNSTON, for defendant in error; J. K. McMAHON, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MALICIOUS PROSECUTION, § 13*—*when person acting on advice of counsel protected.* One who in good faith institutes a criminal prosecution on the advice of counsel is not liable in an action for malicious prosecution for so doing if such person in obtaining such advice communicates to such counsel all the facts of which he has knowledge, or could have ascertained by reasonable diligence bearing on the guilt of the accused.

2. MALICIOUS PROSECUTION, § 78*—*what evidence essential to establish that defendant acted under advice of counsel.* In an action for malicious prosecution, in order to sustain a plea that defendant acted under the advice of counsel, it must appear that he in good faith made a full and fair statement to such counsel of all material facts and in good faith acted on such advice.

3. MALICIOUS PROSECUTION, § 85*—*when question whether defendant fairly communicated facts to counsel and acted in good faith on advice for jury.* Where a defendant in an action of malicious prosecution defends on the ground that he acted under the advice of counsel, the question whether defendant fairly communicated all the material facts to such counsel and acted on the advice in good faith is a question of fact to be determined by the jury on all the evidence.

4. TORTS, § 17*—*when judgment may be taken against one defendant upon dismissal as to another.* In an action of tort it is not error to dismiss as to one defendant on motion of plaintiff after a verdict of guilty as to both and to enter judgment against the other defendant on the verdict, since in such case defendants might have been separately sued.

5. MALICIOUS PROSECUTION, § 98*—*when verdict not disturbed.*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Selle v. Rosenstiel, 197 Ill. App. 637.

In an action of malicious prosecution the amount of damages to be awarded is a question for the jury, and its verdict as to damages will not be disturbed unless manifestly excessive.

6. MALICIOUS PROSECUTION, § 97*—*when punitive damages recoverable*. Punitive damages are recoverable in an action for malicious prosecution where the arrest is made under such circumstances as to indicate a wanton disregard by defendant of the rights of plaintiff in causing his arrest, or where the arrest is procured by means of a false affidavit.

7. MALICIOUS PROSECUTION, § 97*—*how punitive damages should be assessed*. In assessing punitive damages in actions of malicious prosecution there should be a wide difference between cases where defendant slightly fails to use ordinary care and acts without justifiable cause, but without malice, in causing plaintiff's arrest, and cases where defendant intended to do plaintiff a wrong, and uses criminal process to gratify hatred and ill-will, each case being governed by its own facts, and to be decided reasonably and equitably.

8. MALICIOUS PROSECUTION, § 98*—*when verdict not excessive*. In an action for malicious prosecution, where plaintiff after his arrest on a criminal warrant was in confinement in a cell for four hours before being released on bail, a verdict for plaintiff for \$1,000 held not so excessive as to indicate passion or prejudice in the minds of the jury.

9. APPEAL AND ERROR, § 1406*—*when verdict not disturbed on ground of excessiveness on appeal*. The Appellate Court is not warranted in reducing the amount of a verdict, although on some single aspect of the case a smaller amount would be more satisfactory, where the trial court when appealed to refused to interfere and where the Appellate Court is unable to assign a clear and satisfactory reason for interference.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

QK World Publishing Company, Defendant in Error, v.
Harry R. Fisher, Plaintiff in Error.

Gen. No. 21,154. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed February 1, 1916.

Statement of the Case.

Action by the World Publishing Company, a corporation, plaintiff, against Harry R. Fisher, defendant, to recover on a contract for advertising. To reverse a judgment for plaintiff for \$537.07, defendant prosecutes this writ of error.

L. H. CRAIG, for plaintiff in error.

JOHN A. McKEOWN, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1691*—*when defendant by offering evidence accepts ruling that burden of proof is upon him to establish set-off.* In an action to recover on a contract, where defendant pleads set-off, a ruling that under the pleadings in the case and the court rules applicable thereto plaintiff's claim was admitted, and that the affirmative of the issue was with defendant on his set-off, is accepted by defendant by offering evidence to prove the set-off.

2. APPEAL AND ERROR, § 461*—*when question whether finding against weight of evidence and law not preserved for review.* In an action to recover on a written contract, the question that the finding in a case tried without a jury is against the law is not preserved for review where no objection is pointed out, no motion made, the denial of which would preserve a question for review,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and no propositions of law submitted calling for a construction of the contract or any other holding, there being in such case no ruling of the trial court on which to predicate error.

3. **APPEAL AND ERROR, § 594***—*when motion for new trial preserves no question for review.* In an action tried without a jury, a motion for a new trial preserves no question for review.

4. **ASSUMPSIT, ACTION OF, § 41***—*when money voluntarily paid not recoverable.* Money voluntarily paid with full knowledge of all the facts and without fraud, duress or extortion cannot be recovered back although paid under a mistake of law.

5. **PLEADING, § 117***—*when offering evidence of set-off constitutes admission of terms of contract.* In an action to recover on a written contract, where defendant pleads set-off, the act of defendant in offering evidence tending to prove his set-off involves a recognition of the terms of the contract.

6. **APPEAL AND ERROR, § 578***—*when lack of exception to judgment does not prevent consideration of sufficiency of evidence.* The absence of an exception to a judgment, in a trial without a jury, does not preclude consideration of the sufficiency of the evidence to sustain it.

**Marie A. Hesse, Administratrix, Defendant in Error,
v. John A. Colby & Sons, Plaintiff in Error.**

Gen. No. 21,177. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed. Opinion filed February 1, 1916.

Statement of the Case.

Action by Marie A. Hesse, administratrix of the estate of Frances Brantitzky, deceased, plaintiff, against John A. Colby & Sons, defendant, in the Municipal Court of Chicago, to recover on a written con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tract between plaintiff's intestate and defendant for seven monthly instalments of salary alleged to be due under the contract. To reverse a judgment for plaintiff for \$350, defendant prosecutes this writ of error.

Frances Branitzky was employed as a saleswoman by defendant for many years, and was specially valuable as such. In May, 1908, she was injured in defendant's building. February 11, 1910, she executed a general release to defendant and others in consideration of \$6,068.20. February 9, 1910, she entered into an agreement with defendant which refers to the release as executed therewith, in part as follows:

"That in consideration of a general release herewith executed by the party of the second part, to the party of the first part and others, and as a part of the consideration for said general release, the party of the first part promises and agrees to pay to the party of the second part the sum of three thousand dollars (\$3,000), payable monthly, commencing February 1st, 1910, said sum to be payable in equal instalments of fifty dollars (\$50) per month.

"The party of the second part, as a part of the consideration for this payment, agrees that during the five years from February 1st, 1910, she will perform such clerical services for the party of the first part as she may be called upon to do and as she may be physically able to perform without injury to her health or strength.

"It is understood and agreed by the parties hereto that the hours of the party of the second part for such services shall be easy and that she shall be the judge as to whether or not she is able to work during said period of time, the meaning and intention being that the party of the second part shall perform such clerical work for the party of the first part as she is able to perform without injury to her health or strength during said period."

Defendant paid plaintiff's intestate \$50 each month (\$1,800 in all) up to her death in February, 1913. Meanwhile she rendered no services for defendant, but

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rendered similar services for another firm from October, 1912, until the month before her death, working eight and one-half hours a day.

The action was tried by the court without a jury and the finding was for plaintiff for the amount of her claim.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for plaintiff in error; CLYDE E. SHOREY, of counsel.

MOSES, ROSENTHAL & KENNEDY, for defendant in error; JULIUS MOSES and ARTHUR E. MANHEIMER, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 11*—*what constitutes contract for personal services*. A contract providing that defendant shall pay plaintiff's intestate \$50 per month during the term of the contract, and further providing that plaintiff "will perform such clerical services for" defendant "as she may be called upon to do and as she may be physically able to perform without injury to her health or strength," but expressly allowing plaintiff's intestate to be the judge of whether or not she is able to work within the meaning of the contract, is to be construed as a contract for personal services.

2. MASTER AND SERVANT, § 76*—*when death before time for payment of instalments of salary bars recovery*. In an action to recover on a written contract of employment, where the pleadings show that the contract sued on was for personal services, and the affidavit of merits shows as an admitted fact that the contractor died before any of the instalments of salary fell due, such pleadings present no legal cause of action.

3. PLEADING, § 345*—*when exhibits not part of*. Exhibits "annexed" to common-law pleadings are not part of such pleadings.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*when contract sued on part of pleadings*. In an action in the Municipal Court of Chicago to recover on a written contract, where the contract sued on is

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

"annexed" to the statement of claim, but where defendant's affidavit of merits is predicated on the existence of such contract, the contract is to be treated as having been made part of the pleadings, although it does not appear whether it would be part of such pleadings under the rules of the Municipal Court, the system of pleading and practice being loose, and it being in such case proper to construe such pleadings liberally.

5. MASTER AND SERVANT, § 80*—*when question of law only presented in pleadings*. In an action to recover on a written contract of employment where the pleadings show a contract for personal services, and also show as an admitted fact that contractor died before any of the instalments of salary sued for fell due, the pleadings present merely a question of law.

6. CONTRACTS, § 164*—*when parol proof inadmissible in construction of*. In an action to recover on a written contract for personal services, contract construed and held not ambiguous or uncertain so as to require proof of extraneous facts or circumstances in aid of construction.

7. CONTRACTS, § 164*—*how unambiguous contract construed*. Where the language of a written instrument is unequivocal it must be construed as written.

8. MASTER AND SERVANT, § 11*—*when contract for personal services construed as providing for bona fide exercise of judgment by employee whether able to work*. A contract providing that the master shall pay to the servant a stated sum each month during the term of the contract, the servant to perform such services for the master "as she may be physically able to perform without injury to her health or strength," and making the servant the judge as to whether she is able to work within the meaning of the contract, does not leave it optional with the servant whether to work or not, but calls for a bona fide exercise of her judgment in that regard.

9. MASTER AND SERVANT, § 11*—*how contract for rendition of personal services construed*. In an action to recover on a written contract providing that defendant should pay plaintiff's intestate a stated sum of money each month during the term of the contract, intestate to "perform such clerical services" for defendant "as she may be called upon to do and as she may be physically able to perform without injury to her health or strength," and making intestate the judge of whether she was able to work within the meaning of the contract, the contract reciting that it was executed in part consideration of a general release given by intestate to defendant and others of liability for injuries sustained by intestate, held that the contract was to be construed as contemplating that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant was to have the benefit of intestate's services whenever by a bona fide exercise of her judgment she was able to work without injury to her health or strength, and that in addition to the sum paid as consideration for the release defendant was to furnish intestate with employment for the term of the contract at the stipulated salary without deductions for absence when unable to work.

10. TRIAL,—*when finding and judgment for defendant enterable upon motion without evidence.* Where the pleadings in trial without a jury present no issue of fact and no cause of action, it is proper on motion to enter a finding and judgment for defendant without evidence.

11. CONTRACTS, § 289*—*how contract for personal services terminated.* A contract for personal services is terminated by the death of contractor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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